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CURRENT TOPICS

The Law Society and Legal Aid

THE second report of The Law Society on the working of the Legal Aid and Advice Act, 1949, published on 19th February, puts in their right perspective criticisms by judges and others that the certifying committees tended to grant aid where there was no reasonable ground for doing so, thereby wasting public funds. It states that The Law Society always investigated such cases, which were infinitesimal in number compared with those that went through the courts without comment. Some of the criticisms appeared to have been unfounded, and others were misunderstood or misinterpreted. The practice of Her Majesty's judges in commenting upon legal aid was valuable and necessary. Some judicial comments had led to changes in practice; but the public should not deduce that the scheme was being slackly or badly run. The certifying and area committees were acting with the fullest sense of responsibility and in an overwhelming majority of cases they came to the correct view of the case. The legal aid scheme, says the report, has been well supported by both branches of the legal profession, and at 31st March, 1952, 9,341 solicitors and 1,809 barristers were included on the panels of those who were prepared to act for assisted persons.

Efficiency of Certifying Committees

ON the 20th February another case occurred (*Broom* v. *Broom*, *The Times*, 21st February) in which the Court of Appeal had to reaffirm that it was the court's duty to make an order for the payment of solicitor and client costs under reg. 18 (3) of the regulations. STABLE, J., had dismissed a cross-petition by a husband for divorce, his wife's petition having been withdrawn, and his lordship refused to make an order under reg. 18 (3). SINGLETON, L.J., said that it was important to realise that the judges were not in charge of legal aid. The decision whether legal aid was to be granted to a litigant or not was in the hands of different committees, and the judges had to be satisfied with their judgment upon the matter. The committees might sometimes decide wrongly, but they took care over the matter, and if they thought that in their judgment it was right to grant legal aid, the judge must see that solicitors and counsel were remunerated. The Law Society's report, as we have seen, claims that the committees come to a correct view in an overwhelming majority of cases. If, therefore, having been assigned a function by statute, they perform it remarkably well, there would appear to be no case for amending legislation. Mr. A. A. MARTINEAU, writing to *The Times* of 19th February, 1953, thought otherwise. This letter received a prompt answer from Mr. L. A. D. MARTIN on 21st February, 1953, who pointed out that a considerable number of cases are in fact rejected, and there are bound to be a few cases where a committee may make what appears to be a wrong decision when the matter is heard by the judge at a much later date after discovery of documents and with all the witnesses before the court. He also drew attention to the fact that the cost to the Exchequer entailed by the whole scheme is surprisingly small.

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The Advocate and his Client

NEITHER this century nor this country is unique in the exhibition of two tendencies: for the public to identify the lawyer with his client, and for the lawyer to identify himself excessively with his client, so as to lose his sense of detachment. The former tendency was rarely more mistaken than it is to-day, and the latter is becoming increasingly rare. In trials with a semi-political flavour, in which feelings may be expected to run high, a close study of transcripts of verbatim reports reveals exceptional detachment on the part of counsel, and also the fact that advocates are not necessarily chosen for their political beliefs. All this is borne out by Sir HARTLEY SHAWCROSS's address to The Law Society on 18th February, in which he emphasised the duty of barristers to accept without discrimination briefs offered to them. Referring to a recent report that certain members of the Bar in a colony had refused to accept a brief, he said: "I believe this report is incorrect. I profoundly hope it is, for if it were true it would disclose a wholly deplorable departure from the great traditions of our law and one which, if substantiated, both the Attorney-General and the Bar Council, of which I happen to be chairman, would have to deal with in the severest possible way." With regard to the origin of the rule that a barrister must accept a brief on behalf of any client who wished to retain him to appear before any court in which he held himself out to practise, he said it was finally established in the prosecution of Tom Paine for publishing the second part of his *Rights of Man*. The great advocate Erskine, who accepted the retainer to defend Paine, and was deprived of his office as Attorney-General to the Prince of Wales for doing so, said—and said truly—in a famous speech: "From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the court where he daily sits to practise, from that moment the liberties of England are at an end."

A Word to the Wise

A TRITE Latin tag has it that a word is enough for a wise person. Those solicitors who are wise enough to wish to do themselves a good turn and benefit their country at the same time may like to consider a hint dropped by Mr. PATRICK JOHNSON, Managing Director of Power Jets (Research and Development), Ltd., in an article in the *Financial Times* of 13th February entitled "Export British Brains." Exemplifying what can be done in the export of ideas for dollars by the sale of jet aircraft patent rights for $4m. since the war and the earning of many further millions of dollars by individual arrangements, he pointed to the inefficiency with which British ideas were generally marketed. He recommended the spending of more money on research and added that we must "encourage the legal profession and business interests to increase their knowledge of the specialised field of exploitation of what is called 'industrial property'." As we said before, one word to the wise is enough.

The Institute of Advanced Legal Studies

THE fifth annual report of the Institute of Advanced Legal Studies states that the total holding of books at the end of July was 30,550, an increase of 4,635 over the year before. The number of readers during the session was 231, an increase of 70 over the preceding fourteen months. The committee of management wish to place on record their profound sorrow at the death of Lord Macmillan on 4th September, 1952, and learned with pleasure that Sir NORMAN BIRKETT was able to accept nomination as chairman for a second session. They remain most grateful to him for the attention he is able to give to, and the interest he takes in, the affairs of the institute. Great care and much time has also to be given to ensure the regular receipt of the 480 serial publications (a growth of 126 since the figure given in the fourth annual report) of which 63 per cent. come direct from many countries overseas.

Costs

THE NEW SCHEDULE II—(2)

THE question for consideration in this article is the proper basis for assessing solicitors' remuneration in respect of non-contentious work under the new Sched. II. The remuneration is to be such a sum as is fair and reasonable having regard to all the circumstances of the case, and in particular to—

(1) the complexity of the matter or the difficulty or novelty of the questions raised;

(2) the skill, labour, specialised knowledge and responsibility involved on the part of the solicitor;

(3) the number and importance of the documents prepared or perused, without regard to length;

(4) the place where and circumstances in which the business or any part thereof is transacted;

(5) the time expended by the solicitor;

(6) where money or property is involved, its amount or value; and

(7) the importance of the matter to the client.

The first point that must be noticed here is that the old Sched. II cannot be used as a guide, for that schedule will no longer be operative and cannot, therefore, be called in aid. Moreover, it was drawn up nearly three-quarters of a century ago and has not since been amended, except for the addition of a 50 per cent. increase, so that it is out of touch with present economic conditions and cannot be regarded as a proper measure of current worth. Finally, and this is the most important consideration, it weighs the financial value of professional services by a standard that is obsolete and entirely at variance with the standard laid down in the new Sched. II.

In considering what fees they shall charge in future, therefore, in regard to non-contentious work, solicitors would do well to look ahead instead of backwards. They have been trammelled in the past by an unrealistic scale which has paid heed neither to the financial responsibility which solicitors have necessarily had to shoulder, nor to the specialised knowledge which they have had to employ in dealing with particular phases of their professional activities. Solicitors were entitled to and could legally charge no more for drawing an intricate deed, say, for the building of a steamship, which usually bristles with complexities, than they could for drawing a simple agreement under hand. The fee for drawing either document was 2s. per folio, plus 50 per cent. The new Sched. II, if it does nothing else, at least releases solicitors from the shackles of such a fixed and inelastic scale, which governed at least a part of their professional fees in relation to non-contentious work.

The fact that there is no fixed scale after the 1st March next need not deter the solicitor, nor cause him any uneasiness.

He is not alone in this, for other professions suffer the same disadvantage, if disadvantage it be. There is no fixed and unalterable scale which determines the fees to be charged in the medical profession. Accountants have no statutory scale which they can enforce, at any rate, for the major part of their work. How, then, do they determine their fees? The answer is that the fees charged in these professions are based on what is fair and reasonable having regard to circumstances which often must have many features in common with the particular circumstances set out above. The fees in these professions have, however, it will be found, reached a common level, within broad limits, and this level or standard has been achieved by public consent after some years of experience, and, no doubt, solicitors' fees in respect of non-contentious work covered by Sched. II will eventually find a more or less common level.

Solicitors are not wholly unaccustomed to this process, even now, and one of the best examples that can be used is the item "Instructions for Brief" under Appendix N of the Supreme Court Rules. This item is in the discretion of the taxing master. There is no fixed fee and no statutory standard to which one must adhere, yet anyone experienced in dealing with litigation costs can, given the facts and circumstances of the case, estimate with reasonable accuracy what will be allowed for the item in the Supreme Court Taxing Office in any particular case. This is because experience invests those accustomed to deal with these matters with an ability to fit the facts and circumstances of the case under review to the facts and circumstances of earlier known cases. So it must now be with Sched. II cases after the 1st March. There will at first be many apparent inconsistencies, and this cannot be avoided until a body of experience is built up.

The main problem will be to make a start under the new system, and here the solicitor will to a large extent be guided by his past experience. A practice has grown up since the introduction of the "lump sum" remuneration order of 1920 of charging a round sum for services in non-contentious cases, and this round sum had undoubtedly in the past been conditioned to a limited extent by circumstances very similar to those set out in the new order. The old Sched. II, it will be remembered, provided for "such fees for instructions as, having regard to the care and labour required, the number and length of the papers to be perused and the other circumstances of the case, may be fair and reasonable," and in fixing the amount of his lump sum charge the solicitor would usually include a fee for instructions which took into account at least something for the elements of skill and responsibility. He was very limited, however, in this respect since the fees for attendances and for the drawing of documents were bounded by a scale.

It seems probable, therefore, that solicitors will continue to deliver lump sum bills in non-contentious matters on somewhat similar lines to those adopted in the past, subject to the fact that they will now be able to vary the whole of their fees up or down according to the particular circumstances of the case, and unhampered by a scale to which some part, at least, of the fees had to conform. The influence of public reaction on the one hand, and experience within the profession on the other, will, in the course of time, bring solicitors' fees for this type of work to a common level in the same way as those influences have stabilised, within limits, the fees charged in other professions.

The next problem will be the type of records that must be kept in future in order to substantiate the fair and reasonable fee if and when the bill is brought (*a*) to The Law Society for certification or (*b*) to the Supreme Court Taxing Office for taxation. Solicitors will certainly have to be prepared to prove the special circumstances which influenced them in arriving at the amount of the fee, and it seems that there must necessarily be something in the nature of a mild revolution in many solicitors' offices in the matter of costs records.

Certain of the factors to which due weight must be given will appear from the documents of the case and will, therefore, be contained in the file of the matter concerned. This applies particularly to items (1), (3), (6) and (7) above. So far as item (3), that is the documents perused or prepared, is concerned it will be noticed that it is the number and importance of the documents that are to be the determining factors, and not the length. It seems likely, therefore, that item (3) will be bound up to some extent with item (5) which relates to the time expended by the solicitor.

Since it is a circumstance capable of more or less exact measurement, it seems likely that the time factor (item (5) above) will be given a good deal of weight in determining what is a fair and reasonable fee, after due consideration has been paid to the other factors. The order states "time expended by the solicitor," but this is, no doubt, an all-embracing term and the time expended by his staff must also be taken into account. The time expended by the principal will necessarily have to be regarded as more valuable than that expended by the members of the staff, whilst the value of the staff time will have to be graded to the status of the employee.

In order to substantiate a fair and reasonable fee, therefore, it is evident that some sort of time record will have to be maintained, so that the solicitor may be in a position to show how much time both he and the various members of his staff have expended on the case or matter, differentiating between the various grades. Accordingly, it is felt to be essential that solicitors should, from the 1st March, introduce some system of time recording in their offices. This should not be difficult and a record sheet in the file of each matter will, no doubt, suffice, so that each person handling the matter may record the time that he has expended thereon. It should be so designed that there is a separate column for each grade of clerk as well as a column for the principal.

In one respect there is already some guide as to a "fair and reasonable" fee under Sched. II. It has been noticed in earlier articles that negotiating fees on sales and purchases have, under the new order, been transferred from Sched. I to Sched. II, and it seems not unreasonable to suppose that in determining what is a fair and reasonable fee for negotiating in a particular case a good deal of regard will be paid to the price of the property, and to the negotiating scale fees recommended by the Council of The Law Society in its memorandum to the Lord Chancellor. These suggested scale fees will be found on p. 56 of the Council's Annual Report for 1947–1948 and are 2½ per cent. for the first £1,000, 1½ per cent. on the next £4,000, and 1 per cent. on the excess without limit. Whilst all the circumstances mentioned earlier in this article will, of course, have to be considered in assessing the reasonableness of the fee in a particular case, it does seem likely that a fee which approximates to the recommended scales will, subject to other exceptional circumstances, be regarded as fair and reasonable.

This seems to be the most that can be said at this juncture as to the basis of solicitors' fees under the new Sched. II. As we have said before, the matter is one that will work itself out in practice.

In our next article we will deal with the circumstances in which solicitors' bills of costs are to be referred to The Law Society or to the Supreme Court Taxing Office.

J. L. R. R.

A Conveyancer's Diary

IMPROVEMENTS TO SETTLED LAND: RECOUPING THE TENANT FOR LIFE

UNDER s. 87 of the Settled Land Act, 1925, the court has power to make an order directing or authorising capital money to be applied in payment for any improvement authorised by the Settled Land Acts, 1882 to 1890, or by the Act of 1925. It was under this section that an application was made in *Re Duke of Northumberland* [1951] Ch. 202. In that case the tenant for life had spent moneys out of her own pocket on repairs to and maintenance of an agricultural estate, and the decision is principally of importance on the question whether an improvement comprised in Pt. II of Sched. III to the Agricultural Holdings Act, 1948, the cost whereof may be paid out of capital money subject to a settlement by virtue of s. 73 (1) (iv) of the Settled Land Act, 1925, is so payable only when the land on which the improvement is carried out is comprised at the time in a contract of tenancy or not. Vaisey, J., held that it was immaterial for the purpose of paying for such improvements whether the land was let, so as to be comprised in a contract of tenancy, or whether the land was in hand. This was a question of the construction of the Act of 1925 and the agricultural holdings legislation which is for this purpose incorporated by reference in the Act, and it is not the aspect of the case with which I propose to deal to-day.

In *Re Duke of Northumberland* the learned judge, after deciding as already seen that the trustees of the settlement were entitled to apply capital moneys in payment, as for an improvement authorised by the Settled Land Act, 1925, of any money expended by the tenant for life in or about the execution of the works of repair and maintenance in respect of which the application had been made, then went on to consider the period over which the tenant for life was entitled to be recouped the expenditure which she had incurred in executing these works. He there held that recoupment was permissible in respect of works executed on or after the 1st January, 1945, and gave two reasons for choosing that date: first, because the evidence did not deal with any earlier period, and secondly because "recoupment of expenditure made more than six years ago would seem to be inconsistent with the principles laid down in the case of *Re Borough Court Estate* [1932] 2 Ch. 39."

With respect, this second reason is not justified by the authority cited in support of it. In *Re Borough Court Estate* a tenant for life in 1920 carried out at his own expense certain works to the mansion house comprised in the settlement. These works included the eradication of damp and dry rot, new drainage work and the installation of a new water supply, and of these works the only one which was authorised by the Settled Land Act, 1882 (the statute for this purpose in force at the time when the works were done), was the drainage work. Between 1923 and 1929 the whole of the land subject to the settlement (including the mansion house) was sold by the tenant for life in exercise of his powers, but in 1930 he made an application asking that the trustees might be authorised to pay the costs of all the improvements made by him in 1920 out of capital money. The reason for the delay, doubtless, was that it was only in 1929 that it was decided that s. 87 was retrospective in effect, making it possible for a tenant for life to be recouped expenditure on improvements, executed before 1926, of a kind which were not authorised by the Settled Land Acts, 1882 to 1890, but were authorised by the Act of 1925 (*Re Lord Sherborne's Settled Estates* [1929] 1 Ch. 345). In the *Borough Estate* case all the works executed by the tenant for life in 1920, with the exception of the drainage works, were works which first became authorised improvements under the Act of 1925.

The matter came before Maugham, J. (as he then was), who decided in the exercise of his discretion that as an application for recoupment of the tenant for life's expenditure on the drainage works might have been made under the Settled Land Acts, 1882 to 1890, the application so far as it related to those works should be allowed; but he refused the application so far as it related to the other works. These other works, if they constituted improvements at all for the purpose of the application, came under Pt. II of Sched. III to the Settled Land Act, 1925, i.e., they were improvements the costs of which, if paid out of capital money, the trustees of the settlement or the court may require to be replaced by instalments. That being so, Maugham, J., felt that if he were to exercise the jurisdiction of the court to order the repayment to the tenant for life of the costs incurred by him in carrying out these improvements, the right course would be to require him to replace the whole of their cost by instalments treated as commencing from the date on which the works in question were done. But in the learned judge's view, having regard to the great probability that the tenant for life knew that the cost of these works could not have been recouped to him at the time when they were executed under the law as it then stood, and that he must, therefore, have expected to have to pay for the cost of these works out of his own pocket, it was not a case in which the discretion of the court to order the recoupment of the cost of the works to the tenant for life should be exercised.

This is all that was decided in *Re Borough Court Estate*, and it is, I think, clear that there is nothing in this decision to suggest that in ordering any recoupment to the tenant for life under s. 87 of the Settled Land Act, 1925, the court must limit such recoupment to the cost of improvements executed within the period of six years before the application, or any particular period. Indeed, the contrary seems to be the case, since the recoupment ordered in *Re Borough Court Estate* (that of the cost of the works which were held to be an authorised improvement at the time when they were executed) related to works executed ten or eleven years before the application was made.

This is in line with previous decisions on the subject. In *Re Ormrod's Settled Estate* [1892] 2 Ch. 318, for example, an application for a direction that the trustees of a settlement should apply a sum which they had in their hands as capital money towards payment of the costs of certain improvements which had been carried out at various dates both before and after the commencement of the Settled Land Act, 1882, was made in 1891. North, J., held that as regards such of these improvements as had been executed before the commencement of the Act, even if there were jurisdiction to order recoupment, it was not a case in which the discretion to order recoupment should be exercised, for the same reason as that which commended itself to Maugham, J., in *Re Borough Court Estate*: the tenant for life had deliberately spent his own money in improving the estate at a time when he knew that he could not be recouped the money so expended,

and there were no grounds for altering the state of things so established. But as regards all that had been done since the beginning of the year 1883 (when the Act of 1882 had come into operation) recoupment out of capital money was authorised. Thus a period of some nine years ending with the date of application was covered by the order in this case.

In so far, therefore, as the recent decision in *Re Duke of Northumberland* purports to follow *Re Borough Court Estate* in establishing a period of limitation for recoupment under s. 87 of the Settled Land Act, 1925, it is not soundly based on the authority of the earlier case. Indeed, this part of the recent decision may in any case be regarded as *obiter*, as the application, apparently, only extended to works carried out within a period of, roughly, six years before the date of the application (whether this was due to accident or design, it is not possible to say), and the only order which the court could make, assuming that in its discretion it decided to make an order for recoupment at all, was an order limited to a period of six years, or approximately six years.

The earlier cases on this subject show that before the Limitation Act, 1939, came into operation the court regarded itself as free to make an order under s. 87 of the Settled Land Act, 1925, or its predecessor in the Act of 1890, without limit as to the date on which any of the improvements were carried out. There is nothing in the Limitation Act, 1939, which, so far as I can see, bears even remotely on provisions such as s. 87, which creates no rights. Of course, the discretion of the court whether or not to authorise or direct a recoupment or not under s. 87 being absolute, there is nothing improper in putting some limitation on an authority to recoup, but such a limitation should be recognised for what it is and not confused with what it is not. From this point of view the decision in *Re Duke of Northumberland*, or rather the part of it which was said to be based on the principles of *Re Borough Court Estate*, is not (I say it again with great respect) in line with the earlier decisions on this point.

"A B C"

Landlord and Tenant Notebook

GOODWILL: PREDECESSOR IN TITLE

THE Landlord and Tenant Act, 1927, has among its objects, as stated in its heading: "to provide for the payment of compensation for . . . goodwill to tenants of premises used for business purposes, or the grant of a new lease in lieu thereof." When it comes to fulfilling this object, s. 4 requires proof that by reason of the carrying on by the tenant or his predecessors in title at the premises of a trade or business for a period of not less than five years goodwill has become attached to the premises, etc. In *Pasmore* v. *Whitbread & Co., Ltd.* (1953), 97 SOL. J. 111 (C.A.), the court, with some apparent reluctance, upheld the dismissal of a tenant's claim in the following circumstances.

The landlords let a business garage to *F*, on a quarterly tenancy, in 1946. In 1949 *F* negotiated with the applicant for a sale of the business. The landlords "made it plain that they were unwilling to consent to an assignment by Mr. *F* to the tenant of Mr. *F's* tenancy, but they were prepared to grant a new tenancy to the tenant on Mr. *F* surrendering his, and that is how the matter went through." The applicant, in fact, paid *F* £1,625 for goodwill, fixtures and fittings, a large part of that sum being attributable to the goodwill. In 1951 the landlords gave the tenant three months' notice to quit, and the tenant applied for a new lease or compensation in lieu thereof.

An argument that "predecessors in title" in the above cited s. 4 meant predecessors in title to the business was met by pointing to the definition of "predecessor in title" in the interpretation section, s. 25: ". . . any person through whom the tenant or landlord has derived title, whether by assignment, by will, by intestacy, or by operation of law" and reference was made to *Williams* v. *Portman* [1951] 2 K.B. 948 (C.A.), in which a business had been carried on on demised premises for less than five years by an under-tenant of the applicant, who had accepted a surrender and then carried on the business himself. Likewise upholding a dismissal, Evershed, M.R., said: "It is obvious that emphasis might appropriately have been directed to the interest in the business rather than the title to the property; but, whatever might have been done, Parliament chose language which this court must construe to the best of its ability."

In that case and in the recent one the court expressed sympathy with the unsuccessful applicant: "I would willingly have decided in favour of the tenant if I could have found any escape from the wording of the Act," said Denning, L.J. (in *Pasmore* v. *Whitbread & Co., Ltd.*), but in his judgment the learned lord justice mentioned that the policy of the landlords, one which they had indeed adopted in 1915, was not devised so as to evade the Act: they just did not like one tenant assigning to another. We are not told whether the tenancy agreement forbade such alienation, absolutely or conditionally on consent; but it does occur to one that, though the applicant may have lost the benefit of much of his payment, *F* himself might easily have been deprived of the value of the attached goodwill by a quarter's notice expiring at any time before five years had run. Provided, that is, that no new tenancy was then granted to him immediately; for *Lawrence* v. *Sinclair* [1949] 2 K.B. 77 (C.A.) showed that a tenant in that position would fulfil the requirement of carrying on *by him* at the premises of a trade or business for a period not less than five years. That decision and *Butlins, Ltd.* v. *Fytche* [1948] 1 All E.R. 737 (C.A.), in which it was held that the business might be carried on by the agency of sub-tenants and licensees, can be considered cases in which the court was able to give effect to the object as stated in the heading to the Act; they were referred to in our issue of 9th June, 1951 (95 SOL. J. 363), when the "Notebook" discussed *Williams* v. *Portman* (at county court level) and also made some suggestions which might be of use to those acting for tenants in such matters.

"It is very hard on a tenant who has paid a very substantial sum for goodwill" was another observation to be found in the judgment of Denning, L.J., in the recent case; but I suggest that in many cases a tenant is prepared to "take a chance" in circumstances which recall the interesting discussion in Chalmers' Sale of Goods (pp. 35–36 of the 12th edition) about whether English law recognises a sale of "hope." Most readers will have come across cases in which weekly tenancies of newspaper and tobacconists' and other shops (without living accommodation) have been sold for substantial sums representing goodwill; indeed, the parties speak of such transactions as the sale of a business rather than the assignment of a tenancy. And metropolitan readers in particular may know that mere newsvendors' and flower-sellers' "pitches" in London sometimes fetch quite substantial

prices, those concerned blissfully ignoring all that Treby, C.J., said, in *Weekly* v. *Wildman* (1698), Ld. Raym. 405, and all that many have since then said, about the non-existence of easements in gross.

The applicant in *Pasmore* v. *Whitbread & Co., Ltd.*, may, perhaps, have been unlucky in finding landlords whose long-standing policy of objecting to assignments of the term probably had something to do with the Licensing Acts; for the garage which had been let to *F* in fact adjoined a public-house owned by the respondents, and it may well be that a covenant against alienation reproduced one of a type inserted in leases of public-houses in which the personality of the tenant is of greater importance to the lessor. But, as pointed out, even when there is no such restriction on alienation a mere quarterly tenant may hope but cannot expect to qualify for a claim under the Landlord and Tenant Act, 1927, s. 4.

The £1,625 paid by the applicant in the recent case was for "the goodwill, fixtures and fittings, of which a large part was attributable to goodwill," and the respondents, if familiar with the history of another brewery and with Boswell's "Life of Dr. Johnson," may well have appreciated the relative importance of the two: for it was Dr. Johnson himself who, concerned as executor with the sale of a brewery, succinctly emphasised the value of goodwill in a sentence which ran: "We are not here to sell a parcel of boilers and vats, but the potentiality of growing rich beyond the dreams of avarice." The building in that case was freehold, and no question would arise whether the boilers were fixtures or whether they passed; but in *Pasmore* v. *Whitbread & Co., Ltd.*, while the respondents may not consider the point worth troubling about, one may wonder whether the applicant legally obtained value for that part of the payment which was not attributable to goodwill. Possibly the way in which the transaction was carried out may have affected the position, the respondents estopping themselves from laying claim to the fixtures; or these may have been severed and re-affixed. Apart from this, the rule that a surrender deprives a tenant of a right to remove is an inflexible one; the effect was illustrated by *Leschallas* v. *Woolf* [1908] 1 Ch. 641, in which the defendant had originally been a sub-tenant from week to week. He had fitted a number of doors, parts of a staircase, etc., which he ultimately claimed as trade or ornamental fixtures, but the mesne tenancy had been surrendered and he had accepted a new weekly tenancy from the freeholder, since determined. It was held that if the surrender of the mesne tenancy was with his consent, his own tenancy was thereby surrendered and any right of removal lost; if without his consent, his acceptance of a new tenancy effected a surrender of any tenancy he had, with the same result. And in *Slough Picture Hall Co., Ltd.* v. *Wade and Others* (1916), 32 T.L.R. 542, acceptance of a new sub-tenancy from an assignee of a mesne tenancy was held to have the like effect.

R. B.

HERE AND THERE

LEGAL AID

If only politicians filled with reforming zeal could cut their coats according to our cloth we might be rather less critically apprehensive of the far-reaching social boons they press upon us and charge to our account. The trouble with these boons is that their begetters and originators are terrified to death that some colleague or opponent may slip in at a late stage and get the credit. Hence haste. Hence under-estimation of cost and over-estimation of resources. Hence cloud-capped projects, gorgeous compulsory panaceas and blank cheques drawn on the future. It is as if a builder refused to put up anything less than a fifty-room mansion for his client, in case a more modest dwelling might some day need to be improved or extended by a rival firm. Something very like that happened in the national health and education legislation. The legal aid scheme has been somewhat more prudently handled but, even so, some of the natural and probable reactions of human nature seem to have been overlooked. Last month one of the most clear-headed of the Queen's Bench judges remarked in private conversation that he and his colleagues are hard pressed not because of any crime wave but as a result of legal aid. Assize court crime, he said—he was thinking in terms of volume and not of quality—had not really increased so very much of late years and even in Lancashire, if it were given a Central Criminal Court on London lines, the work on the Crown side would be reduced to reasonable proportions. According to him, it is the State-aided civil side that takes up so much more time than formerly and all because no one reckoned with the human element. Formerly, where a solicitor became a little doubtful of his client's financial resources he could usually steer him towards a reasonable settlement. As things are now constituted, all the natural incentives tend to push towards a fight to a finish, since there is everything to gain and nothing to lose. Moreover, even if a plaintiff is inclined to accept a settlement, the sum agreed goes, not straight into his pocket gross, but into the organisation's keeping, whence it will emerge net and who knows how much diminished by permitted deductions? Now all this seems to have been noticed by the advisory committee on legal aid too, judging by their recent report to the Lord Chancellor. The scheme, it suggests, virtually imposes the major surgical operation of litigation when in many cases a far less drastic remedy would do. The applicant is obliged to apply for aid in litigation, which a solicitor, privately advising, would normally treat only as a last resort. Thus "expensive proceedings are started when, with a little advice, possibly to both sides, the whole quarrel might be settled amicably." The report remarks judiciously: "When something is offered free or at cut rates there is always a market for it, whether it is really wanted or not." It was, the committee consider, a false economy to omit to establish an advice scheme to filter the assisted cases. On another human aspect of legal aid, the committee are concerned at the number of persons who avail themselves of it while obviously living well beyond their declared means, thereby creating "a strong suspicion that the applicant is being less than frank not only with the income tax authorities but also with the National Assistance Board." The Legal Aid department now copes with 600 cases a week as compared with 100 in 1950–51.

IRISH STORIES FOR SCOTS

The whole of British society is an interlocking or overlapping system of clubs or secret societies from the Inns of Court and the regimental messes to the society of collectors of model soldiers, which meets in a public house near St. George's, Hanover Square. How much does a member of The Law Society know about the life and customs of Lincoln's Inn just over the way, or of the Royal College of Surgeons in Lincoln's Inn Fields? How much, for the matter of that, does a member of Gray's Inn know about the way they do things in the Middle Temple? There is a very real sense in which you can speak of the Frenchman, the Belgian or the Italian as the man in the street, but the typical inhabitant of this island is the man in the club or pub—it is often the same thing. It is as if the body politic were covered and protected by the innumerable scales of a primitive shirt of mail. Last week

I was taken to a typical Victorian hotel in South Kensington, and found myself incongruously amid a gathering of Scottish exiles, who have been meeting in London for over a century to eat and drink and sing and listen to the pipes and hear again their country's story, and honour their toasts with rhythmical clappings and cheerings. It was strange among those bankers, solicitors and men of affairs and amid the plaster propriety of that nineteenth-century dining room to hear the kilted piper play "Lochiel's Farewell to Isla." The company included two distinguished lawyers, Lord Morton of Henryton and Lord MacDermott, the Lord Chief Justice of Northern Ireland, who in replying to the toast of the guests told two legal stories from over the water which were new to me and are probably new to you. Not long ago, he said, he was trying a case of a disputed will in which it was established that the witnesses to the testator's signature had signed the document after his death. One of them was being cross-examined and was asked whether it did not at the time strike him as extraordinary to be requested to witness the signature of a dead man. Looking desperately round the court, he finally fixed his eyes on the judge and admitted: "Well, my lord, I did think they were leaving it a bit late." The other story concerned a character who was a member of the Ulster Circuit in the old days. He had a good head for his drinks and could cope with a couple of bottles in an evening at the Bar mess. One day at Enniskillen it was known that he had a case to do in Dublin on the morrow and that for that purpose he had to catch a train at 6.30 in the morning. His fellows rather doubted whether, after this customary evening in the mess, this was within even his capacity, but when they came down to breakfast they found he had indeed gone, and questioned the hotel boy as to how it had been managed. The boy assured them that he had got Mr. Smith to the train all right and into it, but just as it was steaming away round the bend he had a fright, for the carriage door began to open. But it was all right. Mr. Smith only put his boots on the running board.

RICHARD ROE.

REVIEWS

Select Legal Essays. By Sir P. H. WINFIELD, Q.C., F.B.A., LL.D. (Cantab.), Emeritus Professor of English Law, Cambridge, of the Inner Temple, Honorary Bencher and Barrister-at-Law. With an Editorial Preface by S. J. BAILEY, Rouse Ball Professor of English Law in the University of Cambridge. 1952. London: Sweet and Maxwell, Ltd. £1 17s. 6d. net.

Reprinted in this interesting collection are fifteen critical essays which appeared in legal reviews between 1919 and 1948. The arrangement is by subjects—Tort, Contract, Quasi-contract and Public Policy and Ethics—but, speaking generally, these subjects seem to have occupied Professor Winfield's attention by turns, so that the sequence at least in the common law essays is nearly chronological. True, the earliest deals with the Assignment of Choses in Action; but it treats that topic in relation to the torts of maintenance and champerty, and is obviously a sequel to articles not here reproduced on maintenance and champerty considered as torts.

A table of some 750 cases gives in a sense a key to the scope and style of the essays. On each topic chosen, whether it be Duty in Tortious Negligence or Ethics in English Case Law, it is not merely a question of building a commentary around one or more leading cases. The whole history of the subject is reviewed and documented and the position reached by judicial development exactly described before the author presents his views on the particular thesis which he has set out to expound. Professor Winfield summarises before he opines. Even if the opinions were not so intrinsically interesting, as they undoubtedly are, the summaries would still be valuable for the student and practitioner.

We mention the practitioner advisedly, for in more than one place the author leans down from his academic chair to bring realism to his discussion of an abstraction. Thus, in examining the question to what extent the idea of a duty owed is a theoretical necessity in the law of negligence, Sir Percy builds a crucial passage on the steps to be taken in a present day action for negligence and he modestly admits, in another essay, that for "one who is not immersed in the practice of the law" it is difficult to attribute general views to the judges on a vague subject like public policy, save so far as the "silent traditions" which influence judges in administering the law may be inferred from their decisions. To the interpretation of trends and tendencies in more settled regions of legal thought, however, there is no more stimulating yet reliable guide than the author of these essays.

Oyez Practice Notes, No. 3: Adoption of Children. Third edition. By J. F. JOSLING, Solicitor. 1953. London: The Solicitors' Law Stationery Society, Ltd. 10s. 6d. net.

This is the third edition of Mr. Josling's valuable and comprehensive work and is the first to be published since the passing of the Adoption Act, 1950. A summary of the law relating to adoption is followed by full and helpful notes as to the procedural steps in the High Court, county court and juvenile court. These notes are detailed and will give to the practitioner all the information which he will need on the things to do to set about obtaining an adoption order. There follows a description of the effect which an adoption has on property rights, intestacy, wills, marriage, taxation and industrial injuries benefit, etc. The subjects of adoption societies and of supervision by welfare authorities are also dealt with and the procedure for obtaining a licence to send a child abroad for adoption is given in detail. All the forms requisite for proceedings in any court are set out in full and the book ends with a list of registered adoption societies.

It can be said with confidence that this book contains everything which a practitioner will need for adoption proceedings in any court and for advising clients on the effect of the adoption. It gives a good deal more information than dearer books on the same subject and should be in the library of every solicitor who deals with adoption. Even those in the profession who never go into court will find it a useful guide on such matters as intestacy, income tax, etc., in relation to adopted children.

We would mention only two minor points of criticism. Firstly, a reference to *Butler* v. *Gregory* (1902), 18 T.L.R. 370, as to the term "parent" not including the natural father of an illegitimate child, might be helpful. Secondly, we would suggest that at the top of each page in the Appendix of Forms there should be put the name of the court to which the form relates and that references to "heading or general title as in form 1" should be deleted as there are two forms numbered 1 in a space of ten pages.

The LAW STUDENTS' DEBATING SOCIETY announces the following motions for debate during March: 3rd March, "That this House regrets that it took to the Law"; 10th March, "That this House deplores the decision of the House of Lords in *General Cleaning Contractors* v. *Christmas* [1952] 2 All E.R. 1110"; 17th March, "That the Circus is an affront to the dignity of man and beast"; 24th March, "That the National Health Service is a menace to health" (joint debate with the Sylvan Debating Society); 31st March, "That the case of *Wright* v. *Cheshire* [1952] 2 All E.R. 789 was wrongly decided."

TALKING "SHOP"

TUESDAY, 17TH *February*, 1953

Mr. *Y* consults me upon the loss of certain valuable fittings from his country house, which at the time of the theft was unoccupied and awaiting sale. Nobody can say how the thief got in, but it may be significant that a key was borrowed from one of the firms of estate agents concerned with the sale of the house. The borrower, a gentleman whose *soi-disant* title is not to be found in Burke's Peerage, cannot now be traced, and the key has not been returned.

On these facts the insurance company disclaim liability, and point to a condition in the policy which restricts the cover to cases of "actual forcible and violent entry," hereinafter called "a.f. and v.e." (The policy, by the way, illustrates what I said recently about misleading endorsements. Described on the outside as a "burglary policy," it covers burglary in part and housebreaking in part, but neither crime completely.)

"A.f. and v.e." certainly suggests something of a more turbulent nature than turning a key in the front door lock and stepping over the sill. Does it make any difference that the key may have been stolen or obtained from the estate agents by false pretences? I have made a note to look up the authorities, if there are any.

WEDNESDAY, 18TH

Yes, there are some authorities, and this of itself is encouraging, for so much insurance law—for better or worse—is lost to posterity in the mists of unreported arbitrations. The most helpful case is *Re An Arbitration between Calf and The Sun Insurance Office* [1920] 2 K.B. 366.

Mr. Calf, a tailor, insured his business premises at 58 Maddox Street under a policy described (with more accuracy than that of Mr. *Y*) as "Burglary and Housebreaking Policy (Business Premises only)"; this policy contained an "a.f. and v.e." condition. The business premises so insured comprised a shop on the ground floor with a fitting-room above it and a trimming-room below. The thief concealed himself in a cellar in the basement, i.e., outside the confines of the "business premises." He waited until tailoring work was finished for the day and then (1) forced back the catch of the lock of the trimming-room door and entered the "business premises"; (2) stole certain articles from the trimming-room; (3) finding his way to the shop barred by two doors, forced them open by the use of great violence; and (4) proceeded on his unlawful occasions to the shop.

On these facts the court held that there was an "a.f. and v.e." into the shop—viz., through the two doors mentioned at (3) above—and inasmuch as there was an "a.f. and v.e." into that part of the business premises there was an "a.f. and v.e." of the business premises as a whole within the meaning of the policy. Thus it was not necessary to decide whether there had been an earlier "a.f. and v.e." into the trimming-room. But none the less the court decided, *obiter*, that there had been such an entry.

Atkin, L.J., in the course of an interesting digression within this digression, called to mind the old-time indictment for burglary "*in nocte ejusdem diei vi et armis domum mansionalem A.B. felonice et burglariter fregit et intravit;*" also that a declaration in trespass *quare clausum fregit* contained the words "*vi et armis*"; and that "the averment that the dwelling-house was broken and entered by force and arms was proved merely by establishing that the latch of the door was lifted or the key was turned." After such a promising start it is a little disappointing—at least from Mr. *Y*'s point of view—that the learned judge adds:—

> "Something more than that is meant by the words 'actual forcible and violent entry' . . . If a person turns a key, he uses force, but not violence. If he uses a skeleton key, he uses force but not violence. If, on the other hand, instead of using a key, he uses a pick-lock, or some other instrument, or a piece of wire, by which as a lever he forces back the lock, it appears to me that he uses force and violence."

Bankes, L.J., using more general language, observed:—

> "All I need say about the words 'forcible and violent entry' is that in my opinion they have reference to the character of the act by which an entry is obtained, rather than the actual amount of force used in making the entry."

THURSDAY, 19TH

Looking over Mr. *Y*'s case again, I observe that it presents the familiar problem: whether to abandon a doubtful case *in limine* or to proceed with it, incur costs and perhaps achieve nothing.

"If he uses a skeleton key, he uses force, but not violence"—*per* Atkin, L.J., *supra*. That would seem to be the end of Mr. *Y*'s case, but like my so much better informed contemporary, Mr. Worldly Solicitor, I am "left wondering." What is a skeleton key if it is not of the *genus* pick-lock? And may not an inferior, badly fitting skeleton key do more damage to the lock than a piece of wire in skilful hands? With respect, Bankes, L.J., seems to be nearer the mark with his test of the "character of the act." Indeed, it might be consistent with the decisions upon "constructive breaking" in burglary cases to treat entry by guile as though it were entry by force and violence.

Unhappily there is still the word "actual," which at first sight one might be tempted to regard as surplusage. In what way does "*actual* forcible and violent entry" differ from "forcible and violent entry"? Surely in this—that the one must be physical, but the other may be theoretical, constructive or fictitious; as in the antithesis, familiar to conveyancers, between "actual" and "constructive" notice.

FRIDAY, 20TH

The *Calf* case, then, offers Mr. *Y* some meagre encouragement, but the same cannot be said of *Re George and The Goldsmiths and General Burglary Insurance Association, Ltd.* [1899] 1 Q.B. 595, to which I will refer for short as the *George* case.

In the *George* case the respondent, i.e., the policyholder, oddly enough stressed the importance of the word "actual" in the "a.f. and v.e." phrase, submitting that by its use the parties had intended to exclude cases of burglary and housebreaking in which entry is only constructively by violence. On the same principle of *reculer pour mieux sauter*, I think that the point might have been better developed to the conclusion that the entry alone needs to be "actual," in other words, that the condition should be construed to mean "entry, actual, forcible and violent." But instead, the respondent admitted the application of the adjective to the whole phrase and was thus left with some rather lame arguments from inconvenience concerning the difficulty of discriminating between degrees of force.

In the Divisional Court (from which this was a successful appeal) Wills, J., took the view that the clause amounted to "an inartistic description of ordinary housebreaking or burglary with certain qualifications . . .," but the Court of Appeal would have none of this or of the respondent's arguments. Lord Russell of Killowen, C.J., said that he thought the parties did not intend to use the words in a technical sense at all; "the words taken together contemplate the existence of not a mere technical entry by violence, but an entry by real violence" (p. 603). The learned judge then proceeded to test the respondent's argument by some homely examples, asking himself how much force and violence should be inferred from a door left ajar, but only so much as to admit a lean person and not a stout one. In his view the policy was "directed to securing the assured

against the consequences of an entry effected by real 'violence,' as the word is commonly understood, in contra-distinction to an entry effected by stealth."

A. L. Smith, L.J., thought that if force and violence were to be admitted in the *George* case it would be true that "every day upon which I enter my house by turning my door handle"—this being the means by which the thief had gained access—"I do so by force and violence." And Collins, L.J., seems to have taken it for granted that the policy did not cover "cases of real burglary effected by the skilful use of skeleton keys or stolen keys, or duplicate keys which have been made by getting a wax impression." He thought that "forcible and violent" should not be construed as meaning "against the will of the owner of the premises." That, I fear, is just the way in which Mr. *Y* wishes to construe it, and the outlook is not hopeful. There is just the possibility, if his claim under the policy fails, of establishing negligence against the estate agents.

"ESCROW."

NOTES OF CASES

The Notes of Cases in this issue are published by arrangement with the Incorporated Council of Law Reporting, and full reports will be found in the Weekly Law Reports. Where possible the appropriate page reference is given at the end of the note.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

SINGAPORE: MIXED MARRIAGE: VALIDITY: COMMON-LAW MONOGAMOUS MARRIAGE

Isaac Penhas *v.* Tan Soo Eng

Lord Merriman, Lord Normand, Lord Oaksey, Lord Reid and Lord Asquith of Bishopstone
17th February, 1953

This was an appeal by Isaac Penhas from a judgment of the Court of Appeal of Singapore, dated 24th March, 1950, affirming a judgment of Gordon-Smith, J., dated 13th September, 1949, which raised the question whether a marriage celebrated in Singapore in 1937 between the appellant's brother, Abraham Penhas, a Jew, and the respondent, Tan Soo Eng, a non-Christian Chinese, in a modified Chinese form constituted a valid marriage according to the law of the colony. The respondent's evidence stated, *inter alia*, that "We decided to have the marriage . . . according to Chinese rites . . . Friends and relatives gathered together and the deceased came at 11 a.m. with three of his friends . . . One was an old Chinese gentleman and two Jews . . . There were sixteen or seventeen guests . . . The old Chinese gentleman brought by the deceased solemnised the marriage. We stood before him. We worshipped the Heavenly God and I worshipped with joss sticks, and he asked us each separately whether we were willing to be man and wife, and we both said 'Yes'." At the time of that ceremony both the deceased and the respondent were British subjects and were at all material times domiciled and resident in Singapore. Neither of them was married at the date of the marriage ceremony. From that date until the deceased was murdered by the Japanese, shortly after the fall of Singapore in February, 1942, they lived together as man and wife and had two children. The appellant had opposed a petition of the respondent for letters of administration to the estate of Abraham Penhas, of whom she claimed to be the lawful widow. The question at issue was whether the respondent and Abraham Penhas were validly married by the ceremony which took place about 22nd December, 1937. Both the trial court and the Court of Appeal held that the respondent had been lawfully married to Abraham Penhas.

LORD OAKSEY, giving the judgment of the Board, said that in accordance with the decisions in *Yeap Cheah Neo* v. *Ong Cheng Neo* (1875), L.R. 6 P.C. 381, and *Carolis De Silva* v. *Tim Kim* (1902), IX S.S.L.R. App. 8, the common law of England was in force in Singapore in 1937, except in so far as it was inapplicable and except in so far as it was necessary to modify it to prevent hardships upon the inhabitants who were entitled by the terms of the Royal Charter of 1826 to the exercise of their religions, manners and customs. There was in 1937 nothing in the religions, manners or customs of Jews or Chinese domiciled in Singapore which prevented them from contracting a common-law monogamous marriage. Accordingly, a marriage celebrated in Singapore in 1937 in a modified Chinese form between a Jew and a non-Christian Chinese who were domiciled and resident there, and neither of whom was married at the date of the ceremony, and who thereafter lived together as man and wife and had two children, constituted a valid common-law monogamous marriage. While there was no form of ceremony of marriage which was applicable to both parties, in adopting what appeared to be a composite ceremony—the wife worshipping according to her Chinese custom and the husband according to his Jewish custom—they indubitably intended the ceremony to constitute a valid marriage, and the evidence sufficiently proved that the parties intended, and that it was, a common-law monogamous marriage and not a Chinese polygamous marriage. In a country such as Singapore, where priests were few and where there was no true parochial system, and where the vast majority were not Christians, it was neither convenient nor necessary that two persons such as the respondent and the deceased should be required to call in an episcopally ordained priest to effect a marriage. Their lordships would humbly advise Her Majesty that the appeal ought to be dismissed.

APPEARANCES: *R. J. A. Temple*, Q.C., *Ian Baillieu* and *H. Forbes* (*Peacock & Goddard*); *P. Colin Duncan* and *A. L. Gordon* (*Sydney Redfern*).

[Reported by CHARLES CLAYTON, Esq., Barrister-at-Law] **[2 W.L.R. 459**

COURT OF APPEAL

HUSBAND AND WIFE: APPEAL FROM DECREE ABSOLUTE: SUBSTITUTED SERVICE

Wiseman *v.* Wiseman

Somervell, Denning and Hodson, L.JJ.
10th February, 1953

Motion for extension of time for appealing.

The parties were married in 1924 and ceased to live together in 1943. In August, 1948, the husband filed a petition for divorce on the ground of desertion, alleging that the wife had refused to join him in 1944, and leave was obtained to proceed by substituted service of the petition by way of advertisement in the Press in a town where relatives of the wife were known to be living. No appearance was entered and, in March, 1949, the husband was granted a decree *nisi* of divorce which was made absolute in April, 1949. Six days after decree absolute the husband married one Miss Thomas, by whom he had a child a year later. The wife was unaware of the divorce proceedings until some years after decree absolute and she sought leave to appeal against the decree, and moved for an order setting aside the decree and directing a new trial. She alleged that the order for substituted service had been obtained by fraudulent concealment of relevant facts and the divorce was, therefore, void, and alternatively contended that the husband and his solicitor had failed to take obvious and reasonable steps to acquaint her of the proceedings, that the decrees were voidable and that the court in the exercise of its discretion should set the decrees aside. The court held that the allegation of fraud was not established.

(*Cur. adv. vult.*)

SOMERVELL, L.J., after considering the inquiries as to the wife's address which might reasonably have been made, but were not made, said that if the court had been told of the possibility of such inquiries, and of persons who were known to have been in communication with the wife, the order for substituted service would never have been made. In the absence of fraud, the proceedings were not void, but voidable; and the court must consider whether in the exercise of its discretion the decrees should be set aside. But for the remarriage and the birth of the child he would have no doubt as to his decision. It had been submitted that remarriage was an absolute bar to setting aside a decree absolute; but the case relied on, *McPherson* v. *McPherson* [1936] A.C. 177, was to be distinguished. Whatever the decision in the present case, the status of one or other of the women would be affected in a manner repugnant to the law; but he had come to the conclusion that the decrees should be set aside owing to the importance which should be attached, particularly in divorce proceedings, to effective service which would bring the

matter to the knowledge of the respondent. Very relevant facts, albeit by inadvertence, had not been disclosed to the court and the application should be allowed.

DENNING, L.J., concurring, said that the nearest approach to justice would be to set the decree aside and let the first wife defend herself. That would do justice to her. If the husband succeeded he could remarry the other lady, which would do justice to them both; if he did not, however, get a decree so much the worse for him. He deserved his fate. The second wife would then undoubtedly suffer; but every woman, when she married, to some extent took her husband on trust as to his declared status. As to the child, he (his lordship) did not think, as at present advised, that the avoidance of the second marriage related back so as to make that child illegitimate. The child was legitimate when born and the doctrine of relation back had never been applied so as to render unlawful that which was originally lawful.

HODSON, L.J., who also concurred, said that if it could be shown that the defence put forward by the wife were derisory, the order should not be avoided, but that could not possibly be said to be so in the present case. The mere fact of remarriage could not be a decisive factor, although it was an important matter in considering whether the court in its discretion should set aside the previous proceedings. Appeal allowed; order for substituted service and subsequent decrees set aside.

APPEARANCES: *J. D. F. Moylan* and *C. Wigram* (*Walter Burgis & Co.*); *D. M. Scott* (*Crawley & de Reya*, for *J. C. M. Dyke, McLusky & Braddell*, Exmouth); *H. E. Park* (*Sharpe, Pritchard & Co.*, for *Nicholls & Nicholls*, Exmouth).

[Reported by JOHN B. GARDNER, Esq., Barrister-at-Law] **[2 W.L.R. 499**

DAMAGES FOR BREADWINNER'S DEATH: PROPER BASIS FOR ASSESSMENT

Heatley *v.* Steel Company of Wales, Ltd.

Lord Goddard, C.J., Jenkins and Morris, L.JJ.
29th January, 1953

Appeal from Croom-Johnson, J.

The plaintiff, a widow with four children, claimed damages from the defendants, her deceased husband's employers, in respect of his death, at the age of 43, in an accident at work. The family lived in a leasehold house mortgaged to a building society. Croom-Johnson, J., held the defendants liable for negligence and breach of statutory duty, and in assessing lump sum damages, on the basis that the weekly income of the deceased would but for his death have been £12, he estimated the notional keep of the deceased at £5 a week, thus assessing the loss to the family at £7 a week. He held further that the plaintiff widow should give credit of £750 on the estimated value of the leasehold house which passed to her on the deceased's intestacy; and on the claim under the Fatal Accidents Acts, 1846 to 1908, he awarded a total lump sum of £3,250, £800 of which he apportioned variously among the children. That total sum was subject to further reduction by the amount—£400 plus funeral expenses—awarded on the claim under the Law Reform (Miscellaneous Provisions) Act, 1934. The plaintiff appealed against the amount of the damages only.

LORD GODDARD, C.J., said that, in awarding a lump sum, the court had to ascertain how much the widow and family had lost by the father's death. The court here disagreed with Croom-Johnson, J., on two matters: (1) On the evidence the estimate of £5 a week to keep one member of a family of six was too high, having regard to present prices and the habits of the deceased in taking for himself £1 spending money from his pay packet. (2) The judge had required the widow to give credit of £750 on the estimated value of the leasehold house subject to a mortgage of £260. The court could not see that any sum at all should be deducted for the value of the house, since the widow with her children would either have to continue to live in it as before, or sell it and find alternative accommodation by purchase or at a rent. Though some nominal value might be shown on paper for the reversionary interests in the lease of the house accruing to the widow on her husband's intestacy, that was not a matter which from a practical point of view could be taken into account. Three thousand two hundred and fifty pounds seemed to the court a very, very low award for a family such as this which had lost a father in the prime of life. A fair amount would be £6,000 under the Acts of 1846 to 1908, less the amount awarded under the Law Reform Act of 1934.

JENKINS and MORRIS, L.JJ., agreed. The appeal was allowed to the extent of increasing the damages to £6,000, £435 16s. being attributed to damages under the Act of 1934, and the apportionment to the children was increased from £800 to £1,000.

APPEARANCES: *H. V. Lloyd-Jones*, Q.C., and *Norman Richards* (*Russell Jones & Walker*); *J. R. Bickford Smith* (*Helder, Roberts & Co.*, for *Roger Williams & Son*, Swansea).

[Reported by Miss M. M. HILL, Barrister-at-Law] **[1 W.L.R. 405**

FRAUD ON POWER OF APPOINTMENT: APPOINTMENT TO OBJECT IN ORDER TO BENEFIT NON-OBJECT

***In re* Dick; Knight *v.* Dick and Others**

Evershed, M.R., Jenkins and Morris, L.JJ. 4th February, 1953

Appeal from Wynn Parry, J.

A testatrix who died in 1950 had a power of appointment over a share in certain trust funds bequeathed by her father. The power was exercisable in favour of brothers or sisters or their issue, and in default of a valid appointment there was provision for accrual to the other like shares bequeathed to her brothers and sisters. By her will dated 28th May, 1947, and a codicil thereto, the testatrix appointed her share to a favourite sister, providing that if the sister did not survive her for more than one month, the appointment should be to a specified nephew. Contemporaneous with the will was a formal memorandum (the last of many accompanying her many wills) in which she desired the appointee, but "without imposing any trust or legal obligation" to provide an annuity of £800 per annum free of income tax for a non-object of the power. In the events which happened, if that proposal had been effected it would have used a very substantial portion of the appointed fund. She further requested that, if the proposed annuitant died within one month of her death, the appointee should, instead, provide an annuity of £150 per annum free of tax to the daughter of the deceased annuitant. A few days before she died the testatrix wrote a letter to the appointee to be opened after her death in which she revised her wishes as expressed in the memorandum. The effect, however, if the revised wishes were carried out, would still have been that the greater part of the appointed funds would have been applied for the benefit of persons who were not qualified to be objects of the power. Wynn Parry, J., held that in these circumstances the appointment made by the testatrix constituted a fraud on the power and was invalid. The appointee, the sister of the testatrix, appealed.

EVERSHED, M.R., said the appointment was a fraud on the power, for (applying the test stated by Lord Parker of Waddington, in *Vatcher* v. *Paull* [1915] A.C. 372, at p. 378: "It is enough that the appointor's purpose and intention is to secure a benefit for himself or some other person not an object of the power") the proper inference to be drawn from the facts was that the appointor had intended and had deliberately attempted by all means available to her to benefit a non-object of the power. It appeared that that was her purpose in making the appointment. It was not her purpose to benefit the appointee, hoping incidentally that the appointee would act towards the non-objects in the way she had suggested.

In *In re Crawshay* [1948] Ch. 123 the test applied had been whether the appointee was subjected to such moral suasion as would lead him to do what the appointor wished, but that test and the propositions formulated by Cohen, L.J., at p. 134, were stated in relation to the facts of that case and were not intended to be an exhaustive formulation of what amounted to frauds on powers, and the more general test was as stated in *Vatcher* v. *Paull*. The appointment was accordingly invalid.

JENKINS and MORRIS, L.JJ., agreed. Appeal dismissed.

APPEARANCES: *G. A. Rink; H. A. Rose; Jack Hamawi* (*Montagu's & Cox & Cardale* for *Snell & Co.*, Tunbridge Wells; *Hardcastle Sanders & Armitage*).

[Reported by Miss E. DANGERFIELD, Barrister-at-Law] **[2 W.L.R. 477**

SALE OF POISONS: SELF-SERVICE SYSTEM: LEGALITY

Pharmaceutical Society of Great Britain *v.* Boots Cash Chemists (Southern), Ltd.

Somervell, Birkett and Romer, L.JJ. 5th February, 1953

Appeal from Lord Goddard, C.J. ([1952] 2 Q.B. 795; 96 SOL. J. 513).

A certain shop belonging to the defendants was arranged on the self-service system, whereby a customer obtained a container, passed into a room where priced articles were displayed for sale, selected the articles required, put them into the container,

and passed out by a cashier, who noted what had been taken and required payment accordingly. A section of the display portion of the premises was called the "Chemist's Dept.," in which were drugs which contained substances included in Pt. I of the Poisons List, but in such small quantities as not to fall within Sched. I to the Poisons Rules, 1949. This section was under the control of a registered pharmacist; whenever a drug was sold it was scrutinised by the pharmacist at the cash desk, and he was authorised to prevent the customer at that stage from removing the drug from the premises. The Pharmacy and Poisons Act, 1933, provides by s. 18: "(1) . . . it shall not be lawful (*a*) for a person to sell any poison included in Part I of the Poisons List, unless . . . (iii) the sale is effected by, or under the supervision of, a registered pharmacist." The plaintiffs contended that this section was contravened by the system of sale at the premises in question. Lord Goddard, C.J., held that no contract of sale was completed until the transaction was agreed to at the cash desk, which was supervised by the pharmacist, so that no offence had been committed. The prosecutors appealed.

SOMERVELL, L.J., said that, in an ordinary shop, the display of goods was an invitation to a customer to make an offer; there was no completed contract until the customer indicated what goods he required, and the shopman accepted that offer. There was no reason for drawing any different implication from the layout of the defendants' shop. If the position were otherwise, a customer who had selected an article and put it in the container could not put it back on finding something else more suitable. There was supervision as required by the Act at the appropriate moment of time, and the appeal failed.

BIRKETT and ROMER, L.JJ., agreed. Appeal dismissed.

APPEARANCES: *H. V. Lloyd-Jones*, Q.C., and *T. Dewar* (*A. C. Castle*); *G. G. Baker*, Q.C., and *G. D. Everington* (*Masons*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] **2 W.L.R. 427**

INCREASE OF COMPANY'S CAPITAL BY ORDINARY SHARES: WHETHER PREFERENCE STOCKHOLDERS' SANCTION NECESSARY

_In re_ John Smith's Tadcaster Brewery Co., Ltd.; John Smith's Tadcaster Brewery Co., Ltd. _v._ Gresham Life Assurance Society and Another

Evershed, M.R., Jenkins and Morris, L.JJ.
5th February, 1953

Appeal from Danckwerts, J.

The capital of John Smith's Tadcaster Brewery Co., Ltd., consisted of 1,740,000 5 per cent. cumulative preference stock, and 1,920,000 ordinary shares of £1 each, all the capital being fully issued and fully paid up. The company was proposing to increase its capital by creating 280,000 ordinary shares of £1 each. The shares were to be issued to the ordinary shareholders and credited (in accordance with power conferred by art. 115 of the articles of association) as fully paid up from the undistributed profits of the company. By art. 48 of the company's articles of association the company had power in general meeting to increase its capital, but by art. 69 the holders of preference stock were only entitled to attend a general meeting of the company if the preference dividend was in arrears or unpaid, or if a resolution was to be proposed for the sale of the undertaking or winding up of the company, or for the reduction of the capital of the company "so as directly to interfere with or affect the rights and privileges of the said holders." Article 54, under the general heading "Modification of Rights," gave the company the following power, subject to the limitations imposed by s. 61 of the Companies Act, 1929 (now contained in s. 72 of the Companies Act, 1948): "all or any of the rights or privileges attached to any class of shares . . . may be affected, modified, dealt with or abrogated in any manner with the sanction of an extraordinary resolution passed at a separate meeting of the members of that class . . ." The company asked whether the proposed increase of capital could be made pursuant to a resolution in general meeting or whether the increase affected the rights of the preference stockholders and must, therefore, be sanctioned by an extraordinary resolution passed at a separate meeting of the holders of preference stock held in accordance with art. 54. Danckwerts, J., held that such a resolution was needed ([1952] W.N. 501; [1952] 2 T.L.R. 853) because the creation of ordinary shares "affected" the rights or privileges attached to the preference stock. The ordinary shareholders appealed.

EVERSHED, M.R., said that the decision in *White* v. *Bristol Aeroplane Co., Ltd.* [1953] 2 W.L.R. 144; *ante*, p. 64, covered this case, notwithstanding differences in the wording of the articles of association of the two companies. He would, therefore, hold that the rights or privileges of the preference stockholders would not be affected by the proposed issue of new capital in such a way as to entitle them to be summoned to a separate meeting.

JENKINS and MORRIS, L.JJ., agreed. Appeal allowed.

APPEARANCES: *M. L. Gedge*, Q.C., and *M. M. Wheeler*; *K. W. Mackinnon*; *R. W. Jennings*, Q.C., and *R. H. Walton* (*Slaughter & May* for *Middletons*, Leeds).

[Reported by Miss E. DANGERFIELD, Barrister-at-Law] **[2 W.L.R. 516**

DUTY OF COURT TO MAKE ORDER AS TO COSTS OF LEGALLY AIDED PERSONS

Page _v._ Page. Metcalfe and Another _v._ Wells

Evershed, M.R., Jenkins and Morris, L.JJ.
11th February, 1953

Appeals from Harman and Roxburgh, JJ.

These two appeals were heard together, the plaintiffs in both actions being legally aided persons. In *Page* v. *Page*, an appeal from a decision of Harman, J., the plaintiff claimed a declaration that certain property acquired by his deceased mother was held on trust for him. He was unable to sustain the action because it appeared that at the relevant date he was a bankrupt and, accordingly, whatever interest he might have had in the property had vested in his trustee in bankruptcy. Harman, J., held that a civil aid certificate should not have been granted to the plaintiff and he refused to make any order as to costs.

The second appeal, *Metcalfe* v. *Wells*, was an appeal from a decision of Roxburgh, J. ([1952] W.N. 516; [1952] 2 T.L.R. 781; 96 SOL. J. 802). The plaintiffs, who were husband and wife, brought an action against the defendant alleging fraudulent misrepresentation and breach of warranty in respect of the purchase by them of a house in Blackpool. After the plaintiffs' case had been opened the judge was informed that an offer which had been made to the plaintiffs long before the commencement of the action, and which had remained open, had been accepted and the case was, accordingly, settled. Roxburgh, J., was of opinion that the offer should have been accepted from the start and that in bringing proceedings the plaintiffs were unreasonable. He, therefore, forbore to make any order as to costs. The plaintiffs in both actions appealed against the failure to make any order as to costs.

EVERSHED, M.R., said that if an order pursuant to reg. 18 (3) of the Legal Aid (General) Regulations, 1950, was not made, the legal advisers had no means of being paid and counsel briefed would get no fees, for it was provided by s. 2 (2) (*b*) of the Legal Aid and Advice Act, 1949, that where legal aid had been granted the solicitor and counsel of the legally aided person were precluded from taking any payment, except that which was directed to be paid out of the legal aid fund. The effect, therefore, was, if no order was made, to impose a punishment on the solicitors and counsel; certainly the parties themselves would not have suffered. The provision in s. 6 (5) of the Act of 1949, with regard to payment out of the fund, was imperative and an order must be made to give effect to it. As no order for costs had been made, the taxing master was unable to tax the costs and the intention of the Act plainly set out in s. 6 (5) was defeated. He (his lordship) referred to *Brown* v. *Brown* [1952] W.N. 204; [1952] 1 T.L.R. 930; [1952] 1 All E.R. 1018, where on appeal from a commissioner in the Divorce Division an order for taxation of costs as provided in Sched. III to the Act of 1949 was made for this reason. The court further held in that case that there was jurisdiction to deal with the matter on appeal, although it had seemed doubtful to him (his lordship) whether there was any *lis* between the parties which the court was competent to entertain, as in each case the real question the court was asked to decide was whether the legal advisers of the legally aided person were to get their costs. The court had no discretion to refuse to make an order for costs of a legally aided person; the civil aid certificate must be taken to have been validly and properly granted and it was obligatory to give effect to the certificate by making the order for taxation.

JENKINS, L.J., said that it had been suggested that reg. 18 (3) of the Legal Aid (General) Regulations, 1950, limited the scope of the general effect of Sched. III to the Act of 1949 so that taxation of an assisted person's costs was only appropriate if an order for payment of costs had been made, but that was not

so. The regulation was added by way of reminder that any order dealing with costs must include the proper direction to that end.

MORRIS, L.J., agreed. Appeals allowed.

APPEARANCES: *O'Connell Stranders* (*J. B. Hoy*, Edgware); *P. A. Ferns* (*Bracewell & Leaver* for *William E. Gill, Shepherd and Co.*, Blackpool).

[Reported by Miss E. DANGERFIELD, Barrister-at-Law] [2 W.L.R. 432

BANKRUPTCY NOTICE FOUNDED ON ORDER OF COURT OF SUMMARY JURISDICTION PROVIDING FOR LEVY OF DISTRESS

In re a Debtor, No. 48 of 1952; *Ex parte* Ampthill Rural District Council *v.* The Debtor

Jenkins and Morris, L.JJ., and Roxburgh, J.
15th February, 1953

Appeal from Divisional Court (Harman and Upjohn, JJ.).

The Ampthill Rural District Council, as statutory water undertakers, obtained on 26th April, 1951, an order against a debtor in a court of summary jurisdiction for the payment of £2 12s. 6d., being a water rate which the council claimed in respect of premises owned by the debtor; together with a further sum of 3s. costs. The order of the court ordered payment of those sums forthwith, "and in default of payment that the sum due hereunder be levied by distress and sale of the defendant's goods." On the same day the same court issued warrants of distress in respect of general and special rates owing by the debtor. To the warrants of distress so issued there was a return of *nulla bona*. On the 22nd August, 1952, a bankruptcy notice was served on the debtor in respect of the sum of £2 15s. 6d., being the total sum owing under the judgment. The registrar dismissed an application by the debtor to set the bankruptcy notice aside on the ground that he had a counter-claim or set-off. The Divisional Court allowed an appeal from that decision on the ground that the words in the order of the court of summary jurisdiction, that in default of payment the sum due "be levied by distress," precluded the issue of a bankruptcy notice.

On appeal, MORRIS, L.J., delivering the judgment of the court, said that the order of the court of summary jurisdiction was "a final judgment or order" within s. 1 (1) (*g*) of the Bankruptcy Act, 1914; that the amount set out in the bankruptcy notice was properly recovered as a civil debt recoverable summarily under ss. 6 and 35 of the Summary Jurisdiction Act, 1879; that the fact that in the order as drawn up it was provided that in default of payment the sum due might be levied by distress and sale of the debtor's goods did not diminish the validity and effectiveness of the order; that the order remained a final order against the debtor and one within the words "execution thereon not having been stayed" of s. 1 (1) (*g*); that a court of summary jurisdiction had no power or authority to make an order that no bankruptcy notice should be issued in respect of the sum due and that what could not have been done by express order could not be regarded as having been done by implication; that there was nothing which precluded the issue of a bankruptcy notice and that, since the debtor had not substantiated the grounds of his appeal to the registrar, the appeal of the council should be allowed.

Order of the Divisional Court reversed.

APPEARANCES: *John Davidson* (*Crossman, Block & Co.*, for *Sharman & Trethewy*, Ampthill, Beds.).

Reported by Miss E. DANGERFIELD, Barrister-at-Law] [2 W.L.R. 444

CHANCERY DIVISION

ADVANCEMENT: SHARES ALLOTTED TO CHILDREN WITHOUT THEIR KNOWLEDGE IN COMPANIES PROMOTED BY FATHER

Shephard and Another *v.* Cartwright and Another

Harman, J. 10th February, 1953

Action.

Shares in companies promoted by a father were allotted to two of his children without their knowledge, and were subsequently sold by him without their knowledge. The children signed a number of documents in connection with these transactions, but did not understand their effect. The father had for long used his children's names to help him in his business activities. He also acquired in each child's name a number of house properties, which he informed them were intended as provisions for them; and he formed an estates company in the books of which each child was credited with about £50,000 on loan account. By his will, after certain bequests and annuities, he bequeathed the residue to the two children and a third child. In an administration action, the two children, who had since learned of the allotments of shares, claimed the allotments should be treated as advancements, and that the testator's estate ought to account to them for the value of the shares sold.

HARMAN, J., said that the claimants had no knowledge in the testator's lifetime of the transactions in the shares; it was contended on their behalf that the allotments, being without contemporary explanation, must be treated as advancements. This was asking the court to decide the matter blindfold. The presumption of advancement as explained in *Dyer* v. *Dyer* (1788), 2 Cox 92, was a circumstance of evidence which might be used to rebut the contrary principle under which property placed by *A* without consideration in the name of *B* was held in the absence of other evidence to belong to *A*. When *B* was a child of *A*, the court might assume in the absence of further evidence that an advancement was intended. But such presumptions were only expedient to get at the truth when there was no other way. It was clear that subsequent oral declarations of a father tending to negative a gift were not admissible. But the same objection did not apply to subsequent actions of the father, such as the sale of the shares: these threw light on his state of mind, and should be treated as part and parcel of the original transaction; support for that view was to be had from *Gray* v. *Gray* (1677), 2 Swans. 594, *Marshall* v. *Crutwell* (1875), L.R. 20 Eq. 328, and other cases. The court was therefore at liberty to look at the facts as a whole; the facts, when examined, indicated that the father had not intended to commit himself irrevocably by way of out-and-out gifts when dealing with the shares; those transactions of which the children were ignorant contrasted with the later transactions of which they were informed at the time, and which were undoubtedly advancements. The claims of the two children accordingly failed. Order accordingly.

APPEARANCES: *Sir Andrew Clark*, Q.C., and *V. Coen* (*Douglas and Co.*); *A. de W. Mulligan* (*MacDonnell*); *Sir Lynn Ungoed-Thomas*, Q.C., and *F. B. Alcock* (*Sidney Pearlman*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [1 W.L.R. 460

WILL: SUBSTITUTIONAL GIFT TO CHILDREN: CONSTRUCTION

In re Brooke, deceased; Jubber *v.* Brooke

Upjohn, J. 13th February, 1935

Adjourned summons.

By his will, dated 16th January, 1919, a testator who died on 15th February, 1926, bequeathed to his wife the interest on £1,000 for her life and, after disposing of his residuary estate, directed as follows: "From and after the decease of my said wife I give and bequeath the said sum of £1,000, or the investments representing the same . . . unto and equally between all my brothers and sisters the children of any being then dead taking the share their parent would have taken if living." The testator had two brothers and seven sisters, of whom (*a*) four sisters were dead at the date of the will; (*b*) the two brothers and another sister were living at that date, but pre-deceased the testator; and (*c*) two sisters survived the testator and of these one only survived the testator's widow. The testator had twenty-nine nephews and nieces, of whom eighteen survived him and nine were known to be still living at the date of the commencement of these proceedings. This summons was taken out by the legal personal representative of the testator. He was the executor and universal legatee of his mother, who was the only daughter of the testator, who survived the testator's widow. The questions raised by the summons were whether the class of brothers and sisters of the testator, whose children were entitled to participate in the distribution of the said investments, consisted of (*a*) brothers and sisters who survived the testator but predeceased his widow; or (*b*) those who were living at the date of his will but predeceased his widow; or (*c*) all his brothers and sisters who predeceased his widow and whether alive or dead at the date of his will. The further question was raised whether the children of any brother or sister of the testator entitled to a share of the said investments took the share as joint tenants or as tenants in common.

UPJOHN, J., said that the case was governed by *Greenwood* v. *Greenwood* (1939), 55 T.L.R. 607, but even apart from authority he would have come to the conclusion that the gift was a *prima facie* vested gift to the brothers and sisters of the testator who survived him and the words which followed were not sufficient

to cut it down to a gift which was contingent on their surviving the widow. Much greater difficulty arose on that part of the gift which gave something to the children of the brothers and sisters who did not survive the testator's widow. This type of gift had been subject to discussion in a large number of authorities: he would refer only to *Loring* v. *Thomas* (1861), 1 Dr. & Sm. 497, and *Miller* v. *Gerrard* [1947] A.C. 461. On the whole he thought that the true way of reading this will was to construe that gift as being to the children of those brothers and sisters who were living at the date of the will, but who predeceased the widow. He came to that conclusion for two reasons; first he thought that the word "any" grammatically referred back to the word "all," and that, therefore, the class of children who took could only be derived from the earlier class, that was the class of all brothers and sisters in existence at the date of the will. Secondly, there was a slight indication in the earlier gift of residue, where the word "any" was plainly used in the sense of the words "said" or "before mentioned." The children of any such brother or sister took as joint tenants, there being no words of severance in the gift to the children.

APPEARANCES: *R. S. Lazarus* (*Light & Fulton*); *M. J. Albery* (*Robbins, Olivey & Lake*); *E. M. Winterbotham* (*Gardiner & Co.* for *Clabburns*, Norwich); *J. L. Eley* (*Pettit* with him) (*Donovan J. Smalley*).

[Reported by Mrs. IRENE G. R. MOSES, Barrister-at-Law] **[1 W.L.R. 439**

COMPANY: WINDING UP: JUDGMENT DEBTS IN RESPECT OF *ULTRA VIRES* CONTRACTS

In re Jon Beauforte (London), Ltd.

Roxburgh, J. 16th February, 1953

Applications on appeal from rejections of proofs by liquidator.

A company was authorised by its memorandum of association to carry on the business of costumiers, gown makers, and other activities *ejusdem generis*. The company decided to undertake the business of making veneered panels, which was admittedly *ultra vires*, and for this purpose erected a factory at Bristol. It later went into compulsory liquidation. The liquidator rejected a number of proofs on the ground that the contracts to which they related were *ultra vires*. Appeals were lodged by three creditors, none of whom had actual knowledge that the veneer business was *ultra vires*. (1) A firm of builders who constructed the factory had brought an action claiming £2,078; the company at first put in a defence that the work had been unlicensed, but later consented to judgment for £2,000, payable in four instalments, the whole debt to be payable in the event of default. Default having been made, the creditors signed final judgment for £2,078. (2) A firm supplied veneers to the company valued at £1,011; being unpaid, they issued a specially endorsed writ and recovered judgment summarily in default of defence. (3) A firm sought to prove for a simple contract debt of £107 in respect of coke supplied to the factory, contending that it might have been used for legitimate purposes. They had received letters from the company on paper headed "Veneered Panel Manufacturers." (*Cur. adv. vult.*)

ROXBURGH, J., said that the third claimants not only had constructive notice of the contents of the company's memorandum of association, but also express notice of the nature of the business being carried on; they accordingly had notice that the transaction was *ultra vires*, and their proof had been rightly rejected. The contracts of the other two claimants were admittedly *ultra vires*, and the question was whether they could pray their judgments in aid. The only authority was the decision of the Privy Council in *Great North-West Central Railway Co.* v. *Charlebois* [1899] A.C. 114; it was a case somewhat difficult to interpret, but it appeared to lay down the principle that no judgment founded on an *ultra vires* contract could be sustained, unless it embodied a decision of the court on the issue of *ultra vires*, or a compromise of that issue. Accordingly, the judgment creditors' proofs had been rightly rejected. The rejection of the applicants' proofs was, however, without prejudice to any rights which they might have (*a*) of tracing their money or property, or (*b*) of participating in the distribution of surplus assets, after provision had been made for the claims of proving creditors, costs and expenses. Application dismissed.

APPEARANCES: *Charles Russell*, Q.C., and *G. B. Parker* (*Gibson & Weldon*, for *Burley & Geach*, Petersfield); *K. L. Coghlan* (*Syrett & Sons*); *P. E. Whitworth* (*Gibson & Weldon*, for *Bayliss, Rowe & Co.*, Bristol); *J. G. Strangman*, Q.C., and *T. D. D. Divine* (*Hatchett Jones & Co.*, for *Bolton & Davidson*, Bristol).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] **[2 W.L.R. 465**

QUEEN'S BENCH DIVISION

LIMITATION: JOINT TORTFEASORS: ACTION AGAINST ONE TORTFEASOR OUT OF TIME: RIGHT OF OTHER TORTFEASOR TO CONTRIBUTION

Morgan *v.* Ashmore, Benson, Pease & Co., Ltd., and Samuel Fox & Co., Ltd.

Donovan, J. 19th December, 1952

Action tried at Leeds Assizes.

The plaintiff's husband was killed on 3rd July, 1948, as the result of an accident while employed by the first defendants, *A* Co., in a factory occupied by the second defendants, *F* Co. The plaintiff brought an action against *A* in due time, claiming damages under the Fatal Accidents Act, 1846. On the 4th July, 1949, she added *F* as second defendants, who were struck out as defendants on the ground that the action against them had not been brought within the twelve months specified by s. 3 of the Act. In February, 1950, *A* claimed contribution from *F* under s. 6 (1) (*c*) of the Law Reform (Married Women and Tortfeasors) Act, 1935, which provides: "any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise." *F* did not dispute that they were joint tortfeasors, but contended that as the plaintiff's action against them was out of time, the claim for contribution must fail.

DONOVAN, J., said that the purpose of the words "who is, or would if sued have been liable" was to identify the joint tortfeasor against whom contribution might be sought. He might be (*a*) a person liable, because sued already, or (*b*) a person not so liable, but who, if sued, would have been liable. *F* claimed that they were not within (*b*), because action against them was taken too late. But that did not touch the questions raised by s. 6, which were: (1) whether *F* were liable in respect of the same damage, and (2) would they have been liable if sued. If *F* had been sued in due time they would have been liable; accordingly, they were liable to make contribution, and could not rely on the limitation period of the Act of 1846. It might be said that that result produced an anomaly, but that could not alter the construction of s. 6 of the Act of 1935. Reference had been made to *Merlihan's* case [1946] K.B. 166, but that case did not require s. 6 to be construed, and so did not affect the present case. Accordingly, *A* were entitled to claim contribution from *F*.

Judgment for first defendants against second defendants.

APPEARANCES: *R. Withers Payne* (*W. H. Thompson*); *G. N. Black* (*Harold Jackson & Co.*, Sheffield); *G. F. Leslie* (*Raworth and Co.*, Harrogate).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] **[1 W.L.R. 418**

LIMITATION: PUBLIC AUTHORITY: BRITISH OVERSEAS AIRWAYS CORPORATION: JOINT TORTFEASORS

Littlewood *v.* George Wimpey & Co., Ltd., and British Overseas Airways Corporation

Parker, J. 29th January, 1953

Action.

On 28th July, 1949, the plaintiff, an employee of British Overseas Airways Corporation, was standing on a travelling mechanical stacker or hoist, emptying drums of waste lubricating oil into a storage tank, from which the oil was to be collected in due course by a purchaser. While he was so engaged, a lorry owned by the Wimpey company collided with the hoist; the plaintiff fell, and sustained injuries. In April, 1951, the plaintiff issued a writ against Wimpey for damages for negligence. In June, 1951, Wimpey served a third party notice on B.O.A.C. claiming contribution or indemnity. In February, 1952, the plaintiff joined B.O.A.C. as defendants, alleging negligence in failing to provide a safe system of work. Both defendants denied negligence, and B.O.A.C. pleaded against both the plaintiff and Wimpey s. 21 (1) of the Limitation Act, 1939, which imposes a limitation of six months on any action "brought against any person for any act done in pursuance . . . of any Act of Parliament, or of any public duty or authority, or in respect of any neglect or default in the execution of any such Act, duty or authority . . ." Wimpey's claim for contribution was based on s. 6 (1) of the Law Reform (Married Women and Tortfeasors) Act, 1935, which provides: "Where damage is suffered by any person as the result of a tort . . . (*c*) any tortfeasor liable in respect of that damage may recover contribution from any other

tortfeasor who is, or would if sued have been, liable in respect of the same damage . . ."

PARKER, J., said that both defendants had been negligent. As to the plea of limitation raised against the plaintiff, B.O.A.C. must first show that they were a public authority. A consideration of the provisions of the Civil Aviation Act, 1946, showed that the intention of the Act was to set up a company entrusted in the public interest with certain duties, which were to be performed irrespective of loss or profit, losses being made good by the Exchequer and profits being dealt with as directed by the Minister. That constituted a public authority. The next question was whether B.O.A.C. were protected by the statute in respect of the act in question, namely, the collection of waste lubricating oil with a view to resale. After a consideration of *Griffiths* v. *Smith* [1941] A.C. 170 and the *Firestone* case [1952] A.C. 452; 96 SOL. J. 448, it had been argued that the neglect had not been in the execution of a public duty or authority, but in something purely incidental thereto. But to be protected the act done need not be a direct execution of a public authority or duty; it was protected if it was a necessary part, albeit trivial or "incidental," of such duty. Here, B.O.A.C. had to empty waste oil from aircraft engines into drums; they could not maintain an inexhaustible supply of empty drums, so the drums must be emptied into a tank, so as to be available for incoming aircraft, and it was immaterial that the oil was to be sold later. B.O.A.C. could therefore claim the benefit of s. 21 (1), and the plaintiff's claim against them failed. As to Wimpey's claim for contribution, the first question was from what date the period of limitation ran. In *Merlihan's* case [1946] K.B. 166 it was held that the cause of action under s. 6 (1) was that arising on the original accident; but in *Hordern-Richmond, Ltd.* v. *Duncan* [1947] K.B. 545 Cassels, J., disagreed and held that limitation only ran from the date when the original defendant had been made liable for damages. The latter was the preferable view, but there was a further difficulty confronting Wimpey; the meaning of "liable" in s. 6 (1) must be "held liable" on being sued to judgment. As the plaintiff's claim against B.O.A.C. was statute-barred, they could not be so "liable," and the claim for contribution must fail. This construction might in some cases produce absurdities, and no doubt the Legislature had not got the Public Authorities Protection Act, 1893, in mind when s. 6 (1) was enacted, but it was not for a court to supply gaps in legislation. Judgment for the plaintiff against the first defendants. Judgment for the second defendants against the plaintiff and the first defendants.

APPEARANCES: *F. W. Beney*, Q.C., and *M. Hoare* (*Owen White & Catlin*); *W. J. K. Diplock*, Q.C., and *S. Rees* (*Stanley and Co.*); *M. Stevenson*, Q.C., and *L. Scarman* (*J. H. Milner and Son*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law.] **[1 W.L.R. 426**

SCAFFOLDING: LAPSE OF TIME BETWEEN INVITEE'S KNOWLEDGE OF DANGER AND OCCASION WHEN DANGER RE-ENCOUNTERED: BUILDING (SAFETY, HEALTH AND WELFARE) REGULATIONS

Wingrove *v.* Prestige & Co., Ltd.

Hilbery, J. 29th January, 1953

Action.

The plaintiff, a clerk of works at a building site where the defendants were erecting a school for his employers, was, in the course of his employment, hurrying down a narrow passage when he struck his head on a scaffold pole, which protruded horizontally across the passage, and received a serious injury. The passage-way was one of the means of access to the buildings, and the plaintiff was aware of the presence of the scaffold and of the danger; although he had not been down the passage or had occasion to visit that part of the site for five or six weeks he knew that the scaffold had not been removed. In the action it was conceded that the relationship between the plaintiff and the defendants was that of invitee and invitor, and the plaintiff claimed damages alleging negligence at common law and also breach of regs. 4 and 5 of the Building (Safety, Health and Welfare) Regulations, 1948 (S.I. 1948 No. 1145).

HILBERY, J., said that there might be cases where a lapse of time between the point of time when an invitee had full knowledge of a danger and that when he next went to the premises as an invitee was such that the knowledge which he had on the first occasion could not be relied on to protect the invitor without any further warning. In the present circumstances where there was a mere lapse of such a period of time as five or six weeks, and where the danger of such an accident as occurred was so open and apparent to all, it was impossible to say that an ordinarily careful invitor would regard it as reasonably necessary to give a further warning, the invitee being an experienced clerk of works who had complained in no uncertain terms about the presence of the poles, and who, for something like one and a half to two months, had daily been about that part of the site. It would be unreasonable to say that he required a fresh warning about their presence merely because for a few weeks he had been attending more particularly to work at the other end of the quite small site. It had been said that the words of reg. 4 (11), not being limited in a way which would confine their operation to the situation which would exist between a contractor and his servant, gave a right against a contractor who erected a scaffold to any person who suffered through a non-compliance with any of regs. 5 to 30. He was unable to give that construction to the regulations. Regulation 4 (11) indicated the limit of the general duty imposed on the person erecting or altering a scaffold. Regulations 5 to 30 were regulations to protect from danger a workman using a scaffold, and the words "sufficient safe means of access shall . . . be provided to every place at which any person has at any time to work" must mean a safe means of access to a place where a person had to work on a scaffold. Regulation 5 could not be intended to put on a contractor who merely erected a scaffold on a site the duty to provide a safe means of access to every form of work at every part of that site. In the circumstances he (his lordship) was unable to find that the plaintiff could succeed. Judgment for the defendants.

APPEARANCES: *J. H. Bassett*, Q.C., and *W. Granville Wingate* (*Philcox, Sons & Edwards*); *Montague Berryman*, Q.C., *Marven Everett*, Q.C., and *H. Tudor Evans* (*Barlow, Lyde & Gilbert*).

[Reported by Miss J. F. LAMB, Barrister-at-Law] **[1 W.L.R. 449**

LEGAL AID: FAILURE OF LEGALLY AIDED PERSON TO SERVE NOTICE: NOT DISENTITLED TO LEGAL AID

King *v.* T. & W. Farmiloe, Ltd.

Gerrard, J. 4th February, 1953

The plaintiff was a legally assisted person who brought an action against the defendants for personal injuries. A civil aid certificate was granted to the plaintiff on 9th June, 1951, before he began proceedings, but his solicitor failed to serve notice as required by reg. 15 (2) of the Legal Aid (General) Regulations, 1950. The plaintiff's action was dismissed, and counsel for the defendants asked for payment of costs.

GERRARD, J., said that the plaintiff was entitled to legal aid under reg. 2 (1) of the regulations as he was a person to whom a civil aid certificate had been granted. There was no sanction in the regulations for failure to serve notice as provided by reg. 15 (2), and he did not see how failure to give notice could invalidate the plaintiff's entitlement to legal aid. The notice appeared to be part of the machinery for operating an inquiry under s. 2 (2) (*e*) of the Legal Aid and Advice Act, 1949. The plaintiff's liability for costs was accordingly limited by s. 2 (2) (*e*).

APPEARANCES: *Barry Chedlow* (*J. R. Spencer Young*); *John Thompson* (*Blount, Petre & Co.*)

[Reported by Mrs. IRENE G. R. MOSES, Barrister-at-Law] **[1 W.L.R. 458**

JURISDICTION OF ENGLISH COURT WHERE DISPUTE ARISES IN SCOTTISH FACTORY: INDUSTRIAL DISPUTES TRIBUNAL AWARD RETROSPECTIVE TO DATE BEFORE DISPUTE AROSE INVALID

R. *v.* Industrial Disputes Tribunal and Others; *Ex parte* Kigass, Ltd.

Lord Goddard, C.J., Lynskey and Pearson, JJ.
4th February, 1953

Application for an order of certiorari.

A company registered in England employed female engineering workers in a factory in Scotland. On 18th January, 1952, the Industrial Disputes Tribunal issued award No. 88 in a dispute which had arisen between similar workers, members of trade unions, and an employers' federation on 23rd November, 1951, awarding a wage increase of 10s. 1d. a week to the workers with effect from 23rd November, 1951. At that time none of the company's female workers were members of a trade union, nor were they, or the company, members of the organisations concerned in that dispute. Some of the company's female

workers joined one of the trade unions concerned in that dispute, and the union approached the company asking for an increase on the worker's wages of 10s. 1d. a week. The company refused to grant the increase, and on 3rd May, 1952, the union reported a dispute to the Minister, who referred it to the tribunal. The tribunal issued an award on 8th July, 1952, describing the dispute as arising out of a claim by the workers for an increase of 10s. 1d. a week operative as from 23rd November, 1951, as provided for in award No. 88. By the award the tribunal found in favour of the claim " and award accordingly." The company applied for an order of certiorari to bring up and quash the award of 8th July, 1952, on the grounds (1) that no dispute capable of being reported to the Minister or referred to the tribunal had ever existed and, therefore, the tribunal had no jurisdiction to make the award ; and alternatively (2) that the award, in that it was retrospective to a date before the dispute had arisen, was *ultra vires* and bad.

LORD GODDARD, C.J., said that the court had come to the conclusion that, although it would be no doubt within the competence of the Court of Session to hear the case, the company had their registered office in this country and the tribunal had sat in this country, and therefore there would be no objection on a point of law or point of comity to the court hearing and determining the motion. At the same time, it would be much better, where the whole subject-matter of the dispute arose in Scotland, that the proceedings should be taken in the Scottish and not the English courts. There was no question but that the trade union did report to the Minister on 3rd May that a difference had arisen between Kigass, Ltd., and their female employees. Whether or not the workers wanted that matter put forward was immaterial ; having read the affidavits filed on behalf of the company as well as the affidavits filed on behalf of the union, it appeared to the court that it was indisputable that a difference had arisen. This claim was being made on behalf of some of the workers for 10s. 1d. a week extra on the wages they were already receiving, and it was perfectly clear that the company declined to pay those wages ; the Minister, therefore, clearly had power to refer the matter to the tribunal. Therefore, there was a dispute ; it was properly referred, and the tribunal consequently had jurisdiction to inquire into that dispute. It was quite obvious that there was no dispute between the employers and the workers in Kigass, Ltd., on 23rd November, 1951. No dispute in fact seemed to have arisen till 11th February, 1952 ; certainly not until after 18th January. The court could only read the award as meaning that the wages were to be increased as from 23rd November, 1951, but the tribunal had no jurisdiction to award an increase from that date. The earliest date from which they could have made an award was from the date when the dispute arose ; it was for the tribunal to determine that date and to have awarded from that date, and they should have so awarded. In those circumstances the award was bad and an order of certiorari must go.

LYNSKEY and PEARSON, JJ., agreed. Order of certiorari.

APPEARANCES : *Charles Lawson* (*Simon, Haynes, Barlas and Cassels*) ; *Sir Frank Soskice*, Q.C., and *John Thompson* (*W. H. Thompson*) ; *Sir Reginald Manningham-Buller*, Q.C., S.-G., and *S. B. R. Cooke* (*Solicitor, Ministry of Labour and National Service*).

[Reported by Miss J. F. LAMB, Barrister-at-Law] **[1 W.L.R. 411**

CHILDREN AND YOUNG PERSONS : APPROVED SCHOOL ORDER : INCORRECT SUBSTITUTION ON APPEAL OF NAME OF LOCAL AUTHORITY LIABLE TO CONTRIBUTE

Isle of Wight County Council *v.* Warwickshire County Council

Lord Goddard, C.J., Lynskey and Pearson, JJ.
6th February, 1953

Case stated by Isle of Wight quarter sessions.

The Children and Young Persons Act, 1933, provides by s. 70 that every approved school order made by a juvenile court " shall name the local authority within whose district the child or young person " named in the order " was resident, or if that is not known, the local authority . . . within whose district the offence was committed." By s. 90 (1) the authority named in the order is made liable to contribute towards the cost of maintenance of the person named in the order, but by s. 90 (2) that authority may, if it contends that the person named in the order is resident in the district of some other authority, appeal to a court of summary jurisdiction to vary the order, and the court may substitute the name of the other authority. A boy, aged 16, had been resident in Warwickshire until September, 1950, when he joined the Navy and served in Suffolk until August, 1951, when he was discharged. He then made his way to the Isle of Wight, where he committed an offence on 19th August. The juvenile court committed him to an approved school, found that he was resident in Warwickshire, and named that county council as the authority liable to contribute. On appeal, quarter sessions held that for the purposes of s. 70 the boy was not resident anywhere, and substituted the name of the Isle of Wight County Council as the local authority within whose district the offence had been committed. That county council appealed.

LORD GODDARD, C.J., said that the case revealed a curious lacuna in s. 90 of the Act, which merited the immediate attention of the Home Office. Quarter sessions had been unable to find that the boy was resident anywhere, and the court could not reverse that finding and find that he was resident in the Isle of Wight merely because he had slept out rough there for two nights. Under s. 70, the justices must ascertain and state the place of residence, if they could ; but if not, they must state the district where the offence was committed. Under s. 90 (2), a local authority named in an order of the justices, if they " desire to contend that the person . . . was resident in the district of some other local authority . . . may . . . appeal . . . (*b*) . . . and if . . . the court is satisfied that the person . . . was resident in the district of that other local authority " it might vary the order by substituting the name of such local authority. It had been entirely overlooked that if the district of residence could not be stated, the place to be named was the place where the offence had been committed. The appellant authority could contend only that the offender resided in some other district, and not that the order should be varied by substituting the district where the offence had been committed. Accordingly, quarter sessions had no power to vary the order of the justices, and the appeal must be allowed.

LYNSKEY and PEARSON, JJ., agreed. Appeal allowed. Leave to appeal.

APPEARANCES : *N. Brodbrick* (*County Solicitor*, Isle of Wight County Council) ; *A. P. Marshall*, Q.C., and *M. G. Polson* (*Sharpe, Pritchard & Co.*, for *Deputy Clerk*, Warwickshire County Council).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] **[2 W.L.R. 451**

NEGLIGENCE : AGENCY : CAR DRIVEN BY FRIEND TO PICK UP OWNER

Ormrod *v.* Crosville Motor Services, Ltd. ; Murphie third party

Devlin, J. 6th February, 1953

Action tried at Chester Assizes.

The first plaintiff was driving a car in which his wife, the second plaintiff, was a passenger, from Birkenhead to Monte Carlo, at the request of the third party, the owner, who was at the time driving another car in the Monte Carlo rally. It had been agreed that after the rally all three parties should spend a holiday in Switzerland in the car driven by the first plaintiff. Soon after leaving, the plaintiffs came into collision with an omnibus belonging to the defendants. They sustained personal injuries, and both vehicles were damaged. They brought an action for negligence. The defendants counter-claimed, alleging negligence in the first plaintiff, and took third party proceedings against the owner, alleging that he was vicariously liable.

DEVLIN, J., after holding that the accident had been caused by the negligence of the first plaintiff, said that there must be something more than granting of mere permission to create liability in an owner who had lent his car, but it was not necessary to show a legal contract of agency. The present case was in an area between the two, where, as du Parcq, L.J., had said in *Hewitt* v. *Bonvin* [1940] 1 K.B., at p. 196, there was a social or moral obligation to drive the owner's car. On the facts, the first plaintiff was under such a duty ; the third party had such an interest in the arrival of the car at Monte Carlo as to create an agency in the first plaintiff. The third party was therefore liable. Judgment for the defendants against the third party.

APPEARANCES : *E. Davies*, Q.C., and *Emlyn Hoosen* (*Berkson and Berkson*, Birkenhead) ; *W. L. Mars-Jones* and *Esyr Lewis* (*A. W. Mawer & Co.*, Liverpool).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] **[1 W.L.R. 409**

TOWN AND COUNTRY PLANNING: INVALID ENFORCEMENT NOTICE: ESTOPPEL

Swallow and Pearson *v.* Middlesex County Council

Parker, J. 10th February, 1953

Preliminary point of law.

The plaintiffs and their predecessors in title had carried on light industrial work for many years at certain premises. On 17th May, 1949, the defendants, the local planning authority, served on the plaintiffs a notice, purporting to be under ss. 23 and 75 of the Town and Country Planning Act, 1947, requiring them to discontinue such user of the premises. Pursuant to s. 23 (3) (*a*), the plaintiffs first applied to the defendants for permission to continue the user; when permission was refused, they appealed to the Minister under s. 16 (1), which appeal was dismissed in March, 1950. In June, 1950, they issued a writ against the defendants, claiming that they were entitled to continue their existing user. In an amended statement of claim, dated April, 1952, they alleged that the notice served was invalid, as it did not include all the terms required by the Act. The defendants contended that, by taking action under the Act, the plaintiffs had approbated the notice and could not now impugn its validity. An order was made for the preliminary trial of the points of law (1) whether the notice was valid, and (2) if it was not, whether the plaintiffs were estopped from disputing its validity.

PARKER, J., said that it was shown by *Burgess* v. *Jarvis* [1952] 2 Q.B. 41; 96 SOL. J. 194, and *Mead* v. *Chelmsford R.D.C.* [1953] 1 Q.B. 32; 96 SOL. J. 696, that in a valid enforcement notice two periods must be set out: one, under s. 23 (2), specifying the period for the taking of the necessary action, and the other, under s. 23 (3), specifying the period at the expiration of which the notice was to take effect. The document in suit did not comply with that requirement and was plainly invalid. Regarding the question of estoppel, the defendants had referred to *Davis* (*Spitalfields*), *Ltd.* v. *Huntley* [1947] 1 All E.R. 246, in which it was held that a tenant, who had applied for a new lease under the Landlord and Tenant Act, 1927, on the basis that his existing lease had been determined, could not afterwards contend that the notice to quit was bad. It was not clear how those principles applied to something prescribed by an Act, but it was clear that no person could waive a requirement of law which was for the public benefit. The Act laid down that enforcement notices must be in a particular form, and that non-observance of them constituted a criminal offence. No amount of so-called waiver or approbation could validate a document, non-observance of which entailed such consequences. The plaintiffs accordingly were not estopped from contesting the validity of the notice. Judgment for the plaintiffs.

APPEARANCES: *N. N. McKinnon* and *J. D. James* (*Craigen, Hicks & Co.*); *G. D. Squibb* (*C. W. Radcliffe*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [1 W.L.R. 422

INSURANCE OF MOTOR CAR AGAINST LOSS: SALE OF MOTOR CAR BY AGENT OBTAINING POSSESSION BY FRAUD: WHETHER A LOSS WITHIN MEANING OF POLICY

Webster *v.* General Accident Fire and Life Assurance Corporation, Ltd.

Parker, J. 11th February, 1953

Special case stated by an arbitrator.

The claimant owned a motor car which was insured by the respondents under a comprehensive policy indemnifying him against loss of the car. In February, 1952, the claimant was induced to part with the possession of the car to *T* on *T's* fraudulent representation that he had a buyer for it. In fact, *T* never had a buyer, but sold the car by auction in such circumstances that the purchaser obtained a good title to it under the Factors Act, 1889, and *T* misappropriated the proceeds. The claimant, having approached the police and been advised by them that any attempt to recover the car would be unavailing, took no further steps in the matter although he knew in whose hands the car was. The claimant claimed that a loss within the meaning of the policy had occurred. The respondents disputed the claim and the matter was referred to an arbitrator, who held that the claimant had sustained a loss of his motor car within the meaning of the policy and stated the question for the court as to whether he was right in so holding.

PARKER, J., said that when a chattel was handed over voluntarily by the owner to another it might make it difficult for the owner thereafter to prove a loss, and it might be in such a case that what was lost was not the chattel but the proceeds, if the chattel was handed over for sale. Equally, if a chattel was handed over to an agent, whether or not as a result of a fraudulent misrepresentation, and the agent then proceeded to deal with the chattel in a way which amounted to conversion of the chattel, there might be a loss. In that connection he relied on *London and Provincial Leather Processes, Ltd.* v. *Hudson* [1939] 2 K.B. 724. *Prima facie* there was a loss at the latest when *T* sent the car to the auction. It appeared from *Moore* v. *Evans* [1917] 1 K.B. 458, 471, that it was never necessary for a claimant to prove that in all circumstances the chattel was irrecoverable; every case depended upon its own circumstances and an assured was not entitled to sit by and do nothing. The test was whether he had taken all reasonable steps, and, having taken those steps, recovery was uncertain. He (his lordship) was satisfied that in all the circumstances the claimant had not failed to do anything which a reasonable man would have done and that recovery of the motor car was uncertain. He was therefore satisfied that there was a loss within the meaning of the policy. Award upheld.

APPEARANCES: *Beney*, Q.C., and *John Thompson* (*Dennes and Co.*); *Colin Duncan* and *B. T. Neill* (*Reynolds, Gorst and Porter*).

[Reported by Miss J. F. LAMB, Barrister-at-Law.] [2 W.L.R. 491

NATIONAL HEALTH SERVICE: HOSPITAL MANAGEMENT COMMITTEE: LIABILITY FOR NEGLIGENCE

Bullard *v.* Croydon Hospital Group Management Committee and Another

Parker, J. 12th February 1953

Preliminary point on pleadings in action.

The infant daughter of the plaintiff died of peritonitis following an operation in a hospital controlled by the first defendants, the hospital management committee. The plaintiff, as administrator of his daughter's estate, sued the committee and the surgical registrar of the hospital for damages for alleged negligence. By their defences both the defendants denied negligence and, in addition, the first defendants raised the point that no action would lie against the hospital committee by reason of the provisions of s. 72 of the National Health Service Act, 1946. The issue so raised was directed to be tried as a preliminary point. Section 72 of the National Health Service Act, 1946, incorporates s. 265 of the Public Health Act, 1875, and adds to the number of authorities specified therein, a hospital management committee. By s. 265 " . . . no matter or thing done by any member of any such authority or by any officer of such authority or other person whomsoever acting under the direction of such authority, shall, if the matter or thing were done . . . *bona fide* for the purpose of executing this Act, subject them . . . to any action, liability, claim or demand whatsoever . . . " Section 13 of the National Health Service Act provides that " . . . a hospital management committee shall, notwithstanding that they may be exercising functions on behalf of the regional hospital board . . . be liable in respect of any liabilities incurred (including liabilities in tort), in the exercise of those functions, in all respects as if the committee were acting as a principal . . . "

PARKER, J., said that if the contention raised by the first defendants were right, it produced an extremely strange result having regard to s. 13 of the National Health Service Act, since it would mean that the effect of s. 72, notwithstanding what was said in plain words in s. 13, was that the management committee could not be sued. He could only accept that contention if he were driven to do so by very clear words negativing in effect what s. 13 provided. He had derived some help from a consideration of the Public Health Act, 1848, which was repealed by the Act of 1875, and which had in s. 140 a section very similar to s. 265 of the later Act. Under s. 140, the decisions in *Arthy* v. *Coleman* (1857), 30 L.T. (o.s.) 101, and *Southampton and Itchin Bridge Co.* v. *Local Board of Southampton* (1858), 8 El. & Bl. 801, were authorities for saying that a local authority (in the present case the management committee) could be sued in negligence. If he had to construe s. 265 of the Act of 1875, he thought that the true view might well be that after the words " *bona fide* " should be read " and without negligence." In his view s. 265 must be linked up with s. 308 which provided for the payment of compensation in certain circumstances, and that the effect of the two sections was that where an act was done in pursuance of the statutory powers given, and was done *bona fide* and without negligence, then no person whose property, for instance, might

be injured, could bring an action, but must rely on the compensation which could be awarded under the provisions of s. 308. It was sufficient in the present case to say that he was not satisfied that s. 72 of the National Health Service Act, 1946, incorporating as it did s. 265 of the Act of 1875, absolved the first defendants from liability. He had been referred to the Scottish case, *Davis* v. *Board of Management for Glasgow Victoria Hospital* [1950] S.C. 382, in which Lord Strachan was very reluctantly driven to the conclusion on the statutes relating to Scotland, which included an equivalent provision to that in s. 13 in the English Act, that a hospital management committee could not be sued. Apart from the fact that the wording of the Public Health (Scotland) Act, 1897, was somewhat different from that of the English Act, he felt unable to follow the decision in that case. The issue must be decided in favour of the plaintiff.

APPEARANCES: *H. T. Buckee* (*Frank Simmonds, Parker and Hammond* for *Percy Holt & Nowers*, Croydon); *Michael Hoare* (*Cunliffe & Airy; Hempsons*).

[Reported by PHILIP B. DURNFORD, Esq., Barrister-at-Law] **[2 W.L.R. 470**

PROBATE, DIVORCE AND ADMIRALTY DIVISION

HUSBAND AND WIFE: JUSTICES: ADEQUATE REASONS

Davidson *v.* Davidson

Collingwood and Karminski, JJ. 29th January, 1953

Appeal to Divisional Court.

The parties, aged twenty-two and eighteen, were married in 1949 and separated in 1952. On 16th September an order was made by justices in the wife's favour on the ground of persistent cruelty. The evidence given was largely, but by no means entirely, directed to an allegation of sodomy. It included allegations of minor assaults and it was suggested to the husband in cross-examination that he had insisted on intercourse *per oram*. The husband denied the allegations; the wife said that she had at first consented to acts of sodomy because she had been persuaded that it was a kind of normal sexual intercourse. The husband appealed.

KARMINSKI, J., giving the judgment of the court, said that the justices' reasons were wholly unsatisfactory and unconvincing. They had stated, *inter alia*, that "there had been abnormal sexual practices." They had not referred in their reasons to the questions of corroboration and acquiescence. Where there had been allegations of sodomy and of other abnormal practices at the hearing of a summons on the ground of persistent cruelty, the justices should state in their reasons in clear terms what precisely they had found, and not say merely that there had been abnormal sexual practices. If they found sodomy, they must say so. His lordship referred to *Statham* v. *Statham* [1929] P. 131; *D. B.* v. *W. B.* [1935] P. 80, and to the importance of the court properly directing itself in such cases to the questions of corroboration and acquiescence. The first case was said to have been cited to the justices; if they had considered the corroboration question it was a matter of great regret that they did not refer to it in their reasons. It was a further matter of regret that they did not appear to have considered the acquiescence question, including the aspect of that question that a wife, especially a young wife, could not be said to have given a true assent if there had been a fraudulent persuasion by the husband that sodomy was one of the normal incidents of married life.

COLLINGWOOD, J., concurred. Appeal allowed; re-hearing ordered.

APPEARANCES: *Geoffrey Crispin* (*Gregory, Rowcliffe & Co.*, for *Wood, McLellan & Williams*, Chatham); *Stranger-Jones* (*T. Boyd Whyte*, Gillingham).

[Reported by JOHN B. GARDNER, Esq., Barrister-at-Law.] **[1 W.L.R. 387**

HUSBAND AND WIFE: INJUNCTION TO RESTRAIN HUSBAND FROM ENTERING MATRIMONIAL HOME

Silverstone *v.* Silverstone

Pearce, J. 30th January, 1953

Cross-summonses for injunctions.

The parties were married in 1923. In 1952 the wife filed a petition for judicial separation on the grounds of cruelty and adultery. On the 23rd December, 1952, she obtained an *ex parte* injunction excluding the husband from the matrimonial home, a flat in which the parties had lived for the previous twelve years. The husband was the tenant and it was admitted that the wife had no legal or equitable interest in it. It was contended on behalf of the husband that the court had no power to enjoin a husband from entering the matrimonial home of which he was the owner and in which the wife had no definite legal or equitable interest.

PEARCE, J., said that if the submission that the court had no power in law to enjoin a husband against entering his own flat were right, the effect would be that where a wife, possibly with small children, who had been treated cruelly by a husband owning the home, had filed a petition on that ground, she would be at the mercy of her husband pending the hearing if he were to insist on returning to the house and living there; he might by moral pressure force her either to abandon her petition or go out of the home with her small children. And the court would be powerless to prevent that injustice. Without going into the exact nature of a wife's rights which Denning, L.J., had considered in *Bendall* v. *McWhirter* [1952] 2 Q.B. 466, a wife had a right to be in the matrimonial home while a petition was pending before that court; and that court was entitled to protect that right and ensure that pressure was not put upon a wife to abandon her petition by evicting her from the home. In the case before him he (his lordship) was satisfied that if he let the husband return to the home he (his lordship) was in fact driving the wife out. It was desirable that the court, if its powers allowed, should prevent a wife from being bullied out of her remedy or deterred by pressure from seeking the help of the court. The court had a discretion in such cases and the practical common sense of the position was that he (his lordship) must decide who was the person to go out, and who was the person to stay in the matrimonial home pending the trial. In the circumstances the fair way of dealing with the matter was to leave the wife in possession of the flat and to make any provisions possible to ensure that she did not inconvenience the husband thereby more than absolutely necessary.

APPEARANCES: *C. N. Shawcross*, Q.C., and *Alan Campbell* (*Howard, Kennedy & Co.*); *Alan Bray* (*Alec Woolf & Turk*).

[Reported by JOHN B. GARDNER, Esq., Barrister-at-Law] **[2 W.L.R. 513**

SURVEY OF THE WEEK

HOUSE OF LORDS

A. PROGRESS OF BILLS

Read First Time:—

Transport Bill [H.C.] [17th February.

Read Second Time:—

Hospital Endowments (Scotland) Bill [H.L.] [18th February.

Leasehold Property Act and Long Leases (Scotland) Act Extension Bill [H.L.] [18th February.

Read Third Time:—

Births and Deaths Registration Bill [H.L.] [19th February.

B. DEBATES

On a motion to call attention to the Government's policy on **Leasehold Reform**, as given in the White Paper, LORD SILKIN said there was considerable apprehension throughout the country among leaseholders as to the terms on which they would be able to continue in their dwelling-houses and also about the bill for dilapidations with which they would be faced at the end of the term. It seemed repugnant to natural justice that when a man had been paying his ground rent and maintaining the property, he should then have to hand it over to the ground landlords without any compensation for improvement, and probably in a condition equal to a new house—which was what most leases provided for.

The Government proposed that the leaseholder should become a sort of "statutory tenant." He would not be able to transmit this tenancy to any member of his family on death; the Government was vague about what rent should be paid—it was to be decided by the county court in default of agreement. There was no guide to the county court judge as to how he should decide it.

As regards compensation for goodwill in business premises the White Paper had not left this to the judge, but had fixed the arbitrary figure of one year's or two years' rateable value. Why should not the rent also bear a relationship to the rateable value? Another possible solution was that the rent should be what the tenant would have paid had he been a rent-restricted tenant.

As regards improvements, LORD SILKIN said he had come across cases where before, for instance, putting in a second bathroom a lessee had had to pay the landlord's surveyor's and solicitors' fees, and agree to an increased rent because of the greater value of the premises, and agree to restore the premises at the end of the lease—not that the landlord would want him to do so, but it was a lever whereby the landlord could extract a bigger sum by way of dilapidations. He had known landlords extort considerable sums also for permitting a change of use, e.g., to have an office or a consulting room.

On the question of compensation for goodwill, LORD MESTON said he was glad to note that the Government did not propose to provide for payment. The granting of a new lease at a fair market price was a much more satisfactory way of dealing with the matter. He was also glad to note that no compensation would be payable for improvements to residential properties.

For the Government, LORD MANCROFT said the reason for the rejection of leasehold enfranchisement was that the Government was convinced that it was not, practically speaking, possible. They would continue the Leasehold Property (Temporary Provisions) Act, 1951, until Christmas 1954, by which time the more permanent legislation foreshadowed in the White Paper would be on the statute book. [18th February.

HOUSE OF COMMONS

A. PROGRESS OF BILLS

Read Second Time :—
Tynemouth Corporation Bill [H.C.] [19th February.
West Bridgford Urban District Council Bill [H.C.] [17th February.

In Committee :—
Iron and Steel Bill [H.C.] [18th February.

B. QUESTIONS

INTER-DEPARTMENTAL COMMITTEE ON STATE IMMUNITIES

Mr. NUTTING stated that this committee had duly considered the questions in its terms of reference relating to the legal immunities enjoyed by organs of foreign States. It had found such great divergencies in State practice as to make it difficult to establish the exact position under international law. In view of the differing opinions among the members of the committee as to what principles it would be best to follow, the committee had been unable to reach any final conclusions or make any final recommendations. As it was clear that further study would not produce a different conclusion, it had been decided not to call on the committee for any further or final report and the committee must, therefore, now be regarded as *functus officio*. [13th February.

DISPOSSESSED FARMERS (APPEALS)

Sir THOMAS DUGDALE said that dispossessed farmers had a right of appeal to an agricultural land tribunal, whose chairman was a barrister of standing appointed by the Lord Chancellor. These tribunals were statutory bodies set up for the purpose and were fully competent to judge impartially on the agricultural merits of a proposal to dispossess. Under the general law the High Court had certain powers of supervision over the decisions of these and similar tribunals as, for example, if they exceeded their jurisdiction or if their decision was on the face of it wrong in law. [16th February.

SALE OF LAND (COMPENSATION)

Mr. HAROLD MACMILLAN gave an assurance that owners who sold land by agreement to public authorities at existing use value would not be treated less favourably in the matter of compensation than those whose land was acquired compulsorily. The Government proposed to pay all owners who had sold land to public authorities at existing use value the full amount of any claim admitted for payment from the £300m. fund. Where the claim covered an area larger than was acquired, the appropriate part of the claim would be paid. This applied to all sales effected before the coming into operation of the legislation which the Government planned to introduce in the next Session. [18th February.

TRUSTEE ACT

Asked how far the Chancellor proposed to make changes in the Trustee Act to permit a higher percentage of investment in equity shares, Mr. BOYD-CARPENTER said the question whether any changes in the Trustee Act were desirable was at present under consideration, but he was not yet in a position to make any statement. [19th February.

STATUTORY INSTRUMENTS

Apple and Pear Marketing Scheme (Approval) Order, 1953. (S.I. 1953 No. 190.) 11d.

Argyll County Council (Abhuinn a Mhuillin) Water Order, 1953. (S.I. 1953 No. 182 (S. 22).) 5d.

Coal Distribution (Restriction) (Amendment) Direction, 1953. (S.I. 1953 No. 227.)

Coal Industry Nationalisation (Revenue Payments) Regulations, 1953. (S.I. 1953 No. 206.) 5d.

Confectionery (Records) (Amendment) Order, 1953. (S.I. 1953 No. 212.)

Control of Sulphur Order, 1953. (S.I. 1953 No. 232.)

Coroners Rules, 1953. (S.I. 1953 No. 205.) 8d.
These rules embody the recommendations of the committee set up in 1951 under the chairmanship of Jones, J., to consider procedure in coroners' courts. They come into force on 1st March.

County of Ross and Cromarty (Loch Glass) Water Order, 1953. (S.I. 1953 No. 215.) 5d.

Double Taxation Relief (Taxes on Income) (Finland) Order, 1953. (S.I. 1953 No. 191.) 8d.

Dressmaking and Women's Light Clothing Wages Council (Scotland) Wages Regulation (Holidays) Order, 1953. (S.I. 1953 No. 189.) 8d.

Fats and Cheese (Rationing) (Amendment) Order, 1953. (S.I. 1953 No. 211.)

General Waste Materials Reclamation Wages Council (Great Britain) Wages Regulation (Holidays) Order, 1953. (S.I. 1953 No. 214.) 6d.

Importation of Lettuce from Southern France (General Licence) Order, 1953. (S.I. 1953 No. 208.)

Importation of Plants (Amendment) Order, 1953. (S.I. 1953 No. 207.)

Import Duties (Drawback) (No. 2) Order, 1953. (S.I. 1953 No. 213.)

Irvine and District Water Board Order, 1953. (S.I. 1953 No. 181 (S. 21).)

London Traffic (Prescribed Routes) (No. 8) Regulations, 1953. (S.I. 1953 No. 230.)

Merchant Shipping (Confirmation of Legislation) (Federation of Malaya) Order, 1953. (S.I. 1953 No. 195.)

Midland Circuit (Nottinghamshire Winter Assize) Order, 1953. (S.I. 1953 No. 196.)
By this order the Nottingham Winter Assize in 1953 will be held at Mansfield as well as Nottingham.

Mid Wessex Water Order, 1953. (S.I. 1953 No. 204.)

North of Scotland Hydro-Electric Board (Constructional Scheme (No. 69) Confirmation Order, 1953. (S.I. 1953 No. 209 (S. 23).)

Oils and Fats Order, 1953. (S.I. 1953 No. 210.) 6d.

Old Metal Dealers (No. 2) Order, 1953. (S.I. 1953 No. 229.)

Reciprocal Enforcements of Judgments (India) Order, 1953. (S.I. 1953 No. 192.)

Reciprocal Enforcements of Judgments (Pakistan) Order, 1953. (S.I. 1953 No. 193.)

Reserve and Auxiliary Forces (Protection of Civil Interests) (Northern Ireland) Order, 1953. (S.I. 1953 No. 197.) 11d.

Retention of Cables and Mains under Highways (Kent) (No. 1) Order, 1953. (S.I. 1953 No. 184.)

Retention of Cables, Main and Pipe under Highways (North Riding of Yorkshire) (No. 1) Order, 1953. (S.I. 1953 No. 225.)

Retention of Cables, Mains and Pipe under Highways (Norfolk) (No. 2) Order, 1953. (S.I. 1953 No. 175.) 5d.

Retention of Cable under Highway (Lancashire) (No. 1) Order, 1953. (S.I. 1953 No. 117.)

Retention of Cables under Highways (Cheshire) (No. 1) Order, 1953. (S.I. 1953 No. 183.)

Retention of Main under Highway (Kent) (No. 2) Order, 1953. (S.I. 1953 No. 176.)

Road Vehicles (Registration and Licensing) Regulations, 1953. (S.I. 1953 No. 231.) 1s. 2d.

Safeguarding of Industries (Exemption) (No. 1) Order, 1953. (S.I. 1953 No. 188.) 6d.

Stopping up of Highways (Norfolk), Order, 1953. (S.I. 1953 No. 200.)

Stopping up of Highways (Oxfordshire) (No. 1) Order, 1953. (S.I. 1953 No. 185.)

Zanzibar Order in Council, 1953. (S.I. 1953 No. 194.)

[Any of the above may be obtained from the Government Sales Department, The Solicitors' Law Stationery Society, Ltd., 102–103 Fetter Lane, E.C.4. The price in each case, unless otherwise stated, is 4d., post free.

NOTES AND NEWS

Honours and Appointments

Mr. ARTHUR HENRY DROOP has been elected a Bencher of Lincoln's Inn.

Mr. G. E. CLARK, solicitor, of Middleton, is to be appointed Clerk to the Justices of the Middleton Borough and Oldham Petty Sessional Divisions, as from 1st May next.

Mr. C. N. DIXON, solicitor, of Whalley, near Clitheroe, is to be appointed Clerk to the Justices of the Blackburn, Church, Darwen Borough and Darwen County Petty Sessional Division, as from 1st May next.

The Board of Trade announce the appointment of Mr. S. J. HUMBLE as Assistant Registrar of Companies and Assistant Registrar of Business Names in England and Wales. Mr. Humble succeeds Mr. A. J. C. Mann.

Personal Notes

Mr. Aneurin Rees, Prestatyn, North Wales, a former Liverpool solicitor, has been elected Moderator of the North Wales Welsh Presbyterian Association for the coming year.

Mr. F. G. W. Gordon, managing clerk to Messrs. Paris, Smith and Randall of Southampton, has retired after sixty-seven years of service with the firm. He became a member of the staff in 1886 and was managing clerk at the time when the present senior partner, Mr. Leonard F. Paris, himself joined the firm forty-nine years ago.

Miss Jane Mitchell, whose home is at Ilsington, near Newton Abbot, Devon, is the first woman solicitor to join the staff of Devon County Council.

Miscellaneous

SICKNESS BENEFIT FOR MEN DRAWING WORKMEN'S COMPENSATION

RESTRICTIONS TO BE REMOVED

The National Insurance Advisory Committee have been asked to consider and report upon the preliminary draft of regulations (the National Insurance (Overlapping Benefits) Amendment Regulations, 1953, H.M.S.O., price 2d.) which propose to remove the restrictions on the receipt of full sickness benefit by a person drawing workmen's compensation. At present a person entitled to compensation for total incapacity may have his sickness benefit reduced for the first six months; and the amount of any compensation for dependants continues to be deducted after the six months from any increase of sickness benefit payable for them.

The Committee will consider any representations on these regulations, if sent before 17th March, 1953, to the Secretary, National Insurance Advisory Committee, 10 John Adam Street, W.C.2.

DOUBLE TAXATION RELIEF: FINLAND

The Double Taxation Relief Convention with Finland relating to taxes on income was ratified on 8th January, 1953, and has now been published as the schedule to an Order in Council numbered S.I. 1953 No. 191.

Wills and Bequests

Mr. E. P. Bowles, solicitor, of Market Drayton, left £44,803 (£41,055 net).

Mr. A. H. Macpherson, solicitor, of Exmouth, left £71,798 (£71,397 net).

Mr. H. W. Faulkner, solicitor, of Frome, left £39,196 (£38,581 net).

Mr. F. Fenwick, solicitor and company director, left £436,627 (£420,068 net).

Mr. C. J. Haydon, solicitor, of Cartmel, Lancashire, formerly of Bournemouth, left £123,833.

Mr. T. Richards, solicitor, of Hove, left £63,174 (£62,486 net).

Mr. W. J. Robbins, solicitor, of the Strand, left £28,923 (£28,433 net).

SOCIETIES

The UNION SOCIETY OF LONDON, meeting in the Common Room, Gray's Inn, at 8 p.m., announces the following subjects for debate in March, 1953: Wednesday, 4th March, "That this House would deplore the withdrawal of British troops from the Suez Canal zone"; Wednesday, 11th March, "That the influence of the cinema is pernicious"; Wednesday, 18th March, "That Korea has been a colossal blunder"; Wednesday, 25th March, "That the rich are overtaxed." The next meeting will be on 15th April.

The UNITED LAW SOCIETY announces the following debates for March, 1953 (to be held at Gray's Inn Common Room, at 7.15 p.m.): Monday, 2nd March, "That the present procedure by which Her Majesty is advised on the exercise of the prerogative of mercy is unsatisfactory" (Opener, Mr. M. J. H. Beazley; Opposer, Mr. J. Sarch); Monday, 9th March, "That the proposed federation of Nyasaland and the Rhodesias should not be put into operation" (Opener, Mr. Donald Keating; Opposer, Mr. Anthony Abrahams); Monday, 16th March, "That travel lengthens the tongue without broadening the mind" (Opener, Mr. L. G. Cullen; Opposer, Mr. W. S. Holliday); Monday, 23rd March, "That this House cannot understand the distinction between a tenancy and a licence" (see *Errington* v. *Errington* [1952] 1 K.B. 290; *Cobb* v. *Lane* [1952] 1 All E.R. 1199—exclusive possession not conclusive of a tenancy) (Opener, Mr. W. H. Godwin; Opposer, Miss C. Parry Evans); Monday, 30th March, "That Great Britain should associate more closely with Western Europe" (Opener, Mr. W. T. A. Pritchett; Opposer, Mr. G. E. Samson).

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